86-531

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1986

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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and Clarke Burton Lloyd

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QUESTIONS PRESENTED

I. Whether the Third Circuit decision is in conflict with the Sixth Circuit and *Wilson v. Garcia* as to the proper approach to the determination of the applicable statute of limitations period in civil RICO claims.

II. Whether RICO provides a civil remedy for a person allegedly injured by a predicate act when, as that person admits, there was no pattern of racketeering activity at the time of injury.

III. Whether the Court of Appeals' decision is in conflict with *Celotex Corporation v. Catrett* and *Anderson v. Liberty Lobby, Inc.* in that it relies upon pleadings in the Malley-Duff Complaint to establish a pattern of racketeering activity in the face of a supported motion for summary judgment.

PARTIES TO THE PROCEEDINGS

Petitioners, Crown Life Insurance Company and Clarke Burton Lloyd, were Appellees below on the issues presented for review.[1]

Clarke Burton Lloyd is an individual, a Canadian citizen and a resident of Chicago, Illinois. Respondent, Malley-Duff & Associates, Inc., was Appellant below on the issues for review. Malley-Duff & Associates, Inc. is a Pennsylvania corporation which has its office in Pittsburgh, Pennsylvania.

Crown Life Insurance Company is a partly owned subsidiary of Crownx, Inc., which has its headquarters in Toronto, Ontario, Canada. The following are nonwholly owned subsidiaries of Crown Life Insurance Company: Crown Financial Management Ltd. with headquarters in London, United Kingdom; Crown Eagle Life Insurance Company Ltd. with headquarters in Jamaica; and Crown Life Carribean Ltd. with headquarters in Trinidad—Tobago.

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[1]The other parties who were Appellees below were Agency Holding Corporation, an Illinois corporation, Agency Holding Corporation, an Ohio corporation, Kerry Patrick Craig, Diane Pariano, Erhman Ratini Oglevee and Craig, Inc., a Pennsylvania corporation, and Robert Oglevee.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Crown Life Insurance Company and Clarke Burton Lloyd, respectfully request that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Third Circuit entered on May 30, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals (A-1) is reported at 792 F.2d 341. The District Court's ruling granting the Petitioners' motion for summary judgment is not officially reported, but is provided in the Appendix (C-1).

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1986. Petitioners filed a timely petition for rehearing under Federal Rules of Appellate Procedure 35(b) and 40(a). On July 1, 1986, the petition was denied (B-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, provides in relevant part:

> Any person injured in his business or property by reason of violation of Section 1962 of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Id. at § 1964(c).

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of Section 2, Title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another

> to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

Id. at § 1962.

The relevant Pennsylvania statute of limitations, 42 Pa.Con.Stat.Ann. § 5524 provides:

> The following actions and proceedings must be commenced within two years:
>
> (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.

(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

(3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.

(4) An action for waste or trespass of real property.

(5) An action upon a statute for a civil penalty or forfeiture, where the action is given to a government unit.

(6) An action against any officer or any government unit for the nonpayment of money or the nondelivery of property collected upon on execution or otherwise in his possession.

The catchall statute of limitations § 5527 provides:

The following actions and proceedings must be commenced within six years:

. . .

(6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation).

STATEMENT OF THE CASE

Malley-Duff & Associates, Inc. ("Malley-Duff"), a Pennsylvania corporation, was brokerage general agent in the Pittsburgh area for defendant, Crown Life Insurance Company ("Crown"), a Canadian corporation engaged in the business of selling life, health and accident insurance,

under a general agency contract which contained the following provision:

> This agreement may be terminated on one month's notice by either party and such notice will be deemed to be given when a registered letter containing the notice is mailed, addressed to the party entitled to the notice at the party's last known address.

Under date of January 11, 1978, defendant, Crown, wrote by registered mail to Malley-Duff giving notice of termination pursuant to the above quoted provision, effective one month from the date of mailing the letter. On February 10, 1978, Malley-Duff brought suit in equity in the Court of Common Pleas of Allegheny County, Pennsylvania, against Crown and Clarke Burton Lloyd, then its Vice President for United States Agencies, seeking to enjoin the termination of the agency contract, and by motion dated February 10, 1978, asked for a preliminary injunction. A hearing on the motion was held before Judge (now Justice) Flaherty on February 15 and 16, 1978, and after the submission of Briefs, Judge Flaherty entered an Order dated February 22, 1978, stating, "... the motion for preliminary injunction is herewith refused." Thereafter, Crown filed Preliminary Objections asserting the availability of an adequate, nonstatutory remedy at law, and asking that the case be transferred to the law side, but this Objection was never brought on for argument. The plaintiff has permitted the equity suit to remain dormant.

On April 5, 1978, Malley-Duff filed an action in federal court (*Malley-Duff I*) against the present Petitioners and the Crown general agents in Chicago and Cleveland, and an individual, Kerry Patrick Craig ("Craig"), complaining about the selfsame termination of its general agency contract with Crown Life, this time setting forth

eight counts (Civil Action No. 78-373-W.D.Pa.). This action asserted claims under the federal antitrust laws for conspiracy and monopolization and, under the common law of Pennsylvania, for breach of contract, malicious interference with the contract, conspiracy or concerted refusal to deal, and for punitive damages.

A five-week trial began on March 8, 1983. At the conclusion of plaintiff's evidence, a directed verdict was granted by the trial court in favor of all of the defendants on each of the counts asserting a violation of the antitrust laws and the count charging breach of contract. The other common law claims were permitted to go to the jury. The jury found that there was no liability for tortious interference with a contractual relation and no liability for a conspiracy with the intent to injure, and refused to assess punitive damages. Some of the defendants, namely Crown, Lloyd and Craig, were found to be liable in the amount of $900,000 on a theory of conspiracy to tortiously interfere with a contract.

All parties appealed to the Court of Appeals for the Third Circuit. On May 7, 1984, that Court reversed the trial court, reinstated the antitrust counts and ordered a new trial, overturning the jury verdict against the defendants. *Malley-Duff & Associates, Inc. v. Crown Life Insurance Company, et al.*, 792 F.2d 341 (3rd Cir. 1986). A Petition for Certiorari to the United States Supreme Court was filed timely. This Petition was denied.

Meanwhile, on March 20, 1981, Malley-Duff had commenced this second action against Crown, Lloyd and various other defendants (*Malley-Duff II*). Malley-Duff alleged violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (Supp. 1970-83) ("RICO"), the Civil Rights Act, 42 U.S.C. § 1985 and the

common law of Pennsylvania based upon alleged acts of some defendants during and in connection with the discovery phase of *Malley-Duff I*. *Malley-Duff I* and *Malley-Duff II* were consolidated for discovery purposes, but prior to the date set for trial, the Court severed the two actions, and *Malley-Duff I* was tried alone.

Following the trial of *Malley-Duff I*, on March 23, 1984, the District Court granted defendants' motion for summary judgment on all federal law counts in *Malley-Duff II* and dismissed the state law claims (C-13). Malley-Duff appealed from that order. On May 30, 1986, a panel of the Court of Appeals for the Third Circuit reversed the District Court's grant of summary judgment on the RICO claims, as well as one claim under § 1985(2), and reversed the dismissal of the pendant state claims (A-30).

Crown Life Insurance Company and Clarke Burton Lloyd filed a timely petition for rehearing pursuant to Federal Rules of Appellate Procedure 35(b) and 40(a). On July 1, 1986, the petition was denied (B-1).

STATEMENT OF THE FACTS

During the years immediately prior to the decision to terminate Malley-Duff, the production of that agency had leveled off. This leveling of production occurred at a level just in excess of Five Million ($5,000,000) Dollars annually. That figure represents the threshold at which a Crown brokerage general agent is rewarded with an increased bonus, in addition to regular commissions, the increased bonus being computed on the entire $5,000,000, as well as on any additional production. The production level regularly attained by Malley-Duff indicated that once this threshold was attained and the increased bonus on past

production received, no further effort was expended. Malley was no longer willing to devote the time and effort necessary to increase the Agency's production. Duff wanted to buy Malley's interest in the agency, but putting more business on the books would only have raised the net worth of the agency and, hence, the price of Malley's interest. The result was a standoff. Crown recognized this fact and urged Malley-Duff to increase its penetration in the Pittsburgh market. These requests went unheeded. Crown had repeatedly warned Malley-Duff that its representation of Crown in the Pittsburgh market had been grossly inadequate. Despite these warnings, Malley-Duff's production continued to lag.

On August 19, 1977, confirming an earlier conversation, defendant Lloyd wrote Malley-Duff and set forth a standard of production that was expected of Malley-Duff in order to retain its status as the Crown Life brokerage general agent in Pittsburgh. This warning was repeated by letter two months later. Malley-Duff failed to improve its marketing efforts. Lloyd recommended that Malley-Duff be terminated as general agent. This recommendation was adopted by senior management. On January 11, 1978, Crown wrote to Malley-Duff giving notice of its intent to terminate Malley-Duff as its general agent in Pittsburgh pursuant to the express provisions of the general agency contract. Upon the request of Malley-Duff, the termination was reconsidered by Crown but Lloyd's superiors, Michael Hutchison, Marketing Vice President of Crown, and Robert Dowsett, President of Crown, adhered to their decision to terminate Malley-Duff. Termination became effective on February 11, 1978.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT DECISION IS IN CONFLICT WITH THE SIXTH CIRCUIT AND *WILSON v. GARCIA* AS TO THE PROPER APPROACH TO THE DETERMINATION OF THE APPLICABLE STATUTE OF LIMITATIONS PERIOD IN CIVIL RICO CLAIMS.

There is a split in the Circuit Courts of Appeals over whether the reasoning of *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938 (1985), requires the application of a single statute of limitations period to all civil RICO claims. At the time the Third Circuit came to its decision in the present case, in which it held that a single statute of limitations should be applied, it was aware that it was in direct conflict with a recent decision of the Sixth Circuit (A-16). *Silverberg v. Thomson McKinnon Securities, Inc.*, 787 F.2d 1079 (6th Cir. 1986). The *Silverberg* court refused to apply the reasoning of *Wilson*, holding instead that the appropriate limitations period had to be determined by the facts of the specific case.[2] This conflict between the Circuits should be resolved by this Court. Whichever side of the conflict this Court adopts, however, requires a reversal of the Third Circuit's decision in the present case.

A. The Conflict

Silverberg involved a wide variety of claims under common law fraud, negligence and securities laws, as well as RICO. The plaintiff's Complaint alleged that the defendants fraudulently induced them to speculate in the options

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[2]Although no other Circuit Court has ruled directly on the question, there is a split among the several District Courts which have addressed the issue.

market and mishandled their accounts. Although the District Court had dismissed the RICO claim on a theory of claim preclusion resulting from a prior state court action, the Sixth Circuit affirmed the District Court on the ground that the RICO claim was barred by Ohio's four-year common law fraud statute of limitations, Ohio.Rev.Code § 2305.09(C).

The Sixth Circuit believed that *Wilson* did not mandate a single statutory period for civil RICO claims. Its rejection of the *Wilson* approach was based upon the finding that a significant factor relied upon by this Court in *Wilson* was absent. It noted that 42 U.S.C. § 1983 provides a "uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Consitution and laws of the Nation," and that § 1983 could have no precise counterpart in state law, because it is essentially "supplementary to any remedy the State might have." *Id.* at 1083 (quoting *Wilson,* 105 S. Ct. at 1945). Because civil RICO claims do not provide a uniquely federal remedy, the Sixth Circuit reasoned, a uniform statute of limitations need not be applied. The court also placed significance on Congress's specific consideration and rejection of the inclusion of a limitation period in the RICO statute.

The Third Circuit took care to make it clear that it did not disagree entirely with the Sixth Circuit. It said, "We do not suggest that civil RICO is a uniquely federal remedy in the same sense as § 1983. A state could, as some have, create a private cause of action substantially similar to civil RICO." (A-13, n.13). Nevertheless, the Third Circuit based its adoption of the *Wilson* approach upon two considerations: first, analogies between RICO and traditional state causes of action are imperfect and, second, a uniform

limitations period would increase the effectiveness of the statute (A-16).

The decisions of the Sixth and Third Circuits are irreconcilable and, in order to eliminate the confusion, it is necessary for this Court to instruct the Circuits as to which approach to take.

B. The Most Appropriate Statute of Limitations

Whichever approach this Court may decide upon, the appellants' position is that the most appropriate Pennsylvania statute of limitations is its two-year statute concerning injury to one's business or property. Whether the court is looking for the most appropriate statute of limitations to apply in all RICO claims, or for the one most appropriate to the facts and circumstances of this case, there is but one bona fide candidate, 42 Pa.Con.Stat.Ann. § 5524(3) and (4) (Purdon 1981). The Third Circuit's adoption of the Pennsylvania six-year catchall statute of limitations, 42 Pa.Con.Stat.Ann. § 5527(b) (Purdon 1981), for all RICO claims is inappropriate under either theory. It should be noted in this context that the Third Circuit was factually incorrect when it stated that the parties agreed that common law fraud was the most analogous state cause of action to the present RICO claim. (A-7) (See, Supplemental Brief of Crown and Lloyd to the Third Circuit, p. 8-9)

The gravamen of Malley-Duff's Complaint is that its business was injured by the termination of its agency agreement with Crown. Under 18 U.S.C. § 1964(c), a person has a civil RICO action against others for damages to one's "business or property." Under Pennsylvania law, there exists a two-year statute of limitations period for any action concerning injury to one's business or property, real or personal. Title 42 Pa.Con.Stat.Ann. § 5524(3) (Purdon

1981) states that a two-year statute of limitations period exists for "an action for taking, detaining or injuring personal property . . ." Personal property as defined in Pennsylvania is "everything except real estate," *McGlathery's Estate,* 311 Pa. 351, 354, 166 A. 886, 887 (1933), and includes intangible personal property. *Home for Crippled Children v. Erie Insurance Exchange,* 130 P.L.J. 480 (C.P.Alleg. 1982), *aff'd. mem.* 329 Pa. Super. 610, 478 A.2d 84 (1984) (analyzing the present relevant statute and holding that tortious interference with a contractual relationship is controlled by the two-year statute). Accordingly, personal property includes a business. In fact, the Third Circuit itself adopted the reasoning of *Home for Crippled Children* and held that the two-year statute of limitations period applied to a claim for tortious interference with employment contracts. *Mazzanti v. Merck & Co.,* 770 F.2d 34, 36 (3rd Cir. 1985). In addition, § 5524(4) provides a two-year period for tortious conduct affecting real estate. A more appropriate statute of limitations period cannot be found under Pennsylvania law following the case by case approach of the Sixth Circuit.

If this Court should adopt the Third Circuit's holding that a *Wilson v. Garcia* approach is required, then this Court is requested to correct the misapplication of *Wilson* in the present case.

The critical question to be answered in determining the "most appropriate" or the "most analogous" statute of limitations to apply to civil RICO claims is: What is the best characterization of the essence of the claim? *Wilson,* 105 S. Ct. at 1943. In addressing this question for the purposes of 42 U.S.C. § 1983, this Court recognized that

the "§ 1983 remedy encompasses a broad range of potential tort analogies, from injuries to property to infringements of individual liberty." *Id.* at 1948. This Court focused on the nature of the injury alleged as opposed to the various potential sources of injury and stated, "In view of our holding that § 1983 claims are best characterized as personal injury actions, the Court of Appeals correctly applied the 3-year statute of limitations governing actions 'for an injury to the person or reputation of any person.' " *Id.* at 1949.

RICO civil claims, based upon the language of § 1964(c) itself, are best characterized as remedies for injuries to business or property. Section 5524(3) and (4) governs injuries to personal or real property including business property.

Although, as the Third Circuit pointed out, Section 5524 might not apply to all of the predicate acts, it would apply to any trespass against business or property encompassed by 18 U.S.C. § 1964(c). Tortious interference with business or property is the evil against which the Congress enacted RICO and provided a protective civil remedy.

If the courts are to limit an unfettered use of the RICO statute in cases not involving organized crime, it would be most appropriate to apply the same state statute which is used in a claim for tortious interference with a contractual relationship and thus provide the protection against tortious interference with businesses or other personal property which is a specific concern of § 5524(3) and (4). Such a two-year limitation would not be contrary to the federal mandate. In fact, it would indeed be strange to find that a two-year statute of limitations would apply in the case of a common law claim for tortious interference with a business relationship, but that a claim for the same tortious

interference with the same business relationship would have a sixth-year statute of limitations because it was framed as a RICO violation.

II. RICO DOES NOT PROVIDE A CIVIL REMEDY FOR A PERSON ALLEGEDLY INJURED BY A PREDICATE ACT WHEN AS THAT PERSON ADMITS THERE WAS NO PATTERN OF RACKETEERING ACTIVITY AT THE TIME OF INJURY.

The Third Circuit categorized Malley-Duff's RICO claims into two categories: (1) claims arising out of the allegedly fraudulent termination of the agency, and (2) claims arising out of the alleged obstructions of justice by defendants during the course of the discovery phase of *Malley-Duff I* (A-5). With respect to the first category, Malley-Duff has taken the position that only one predicate act occurred as of the date of the termination of its agency agreement for which it seeks RICO damages.

The Third Circuit said, "A large part of the briefing and argument in this matter has been devoted to the difficult issue of when the RICO claims accrued" (A-8, n.8). It then went on to say that because it adopted a six-year period, it would not reach the accrual issue. Whether or not a RICO cause of action had accrued on or before February 11, 1978, is a fundamental one under § 1964(c), because a RICO injury must be by reason of conduct constituting a pattern of racketeering activity. It is contrary to *Sedima, S.P.R.L. v. Imrex Co.*, ____ U.S. ____, 105 S. Ct. 3275 (1985), to change a single predicate act into a pattern of racketeering injury by predicate acts allegedly occurring months and years later. The *cause* of a RICO

injury (a pattern of racketeering activity) cannot be preceded by its *effect* (a RICO injury).

In its Briefs before the Third Circuit, as well as at oral argument, Malley-Duff conceded that no cause of action had accrued under RICO on or before the termination of its agency:

> . . . [T]he District Court erred by computing the statute of limitations from a date which preceded the existence of a cause of action under RICO. The trial court inexplicably segregated plaintiff's RICO claims into the constituent acts of racketeering, which injured Malley-Duff, i.e., the mail fraud resulting in Malley-Duff's termination and the obstructions of justice (Footnote 12). It then applied the statute of limitations not to Malley- Duff's RICO claim, but to the first racketeering activity, mail fraud, as if plaintiff were suing directly under 18 U.S.C. § 1341.

Malley-Duff Brief to the Third Circuit, p. 32.

> When defendant fraudulently terminated plaintiff, *no RICO cause of action existed since there were no multiple acts of racketeering.*

Id. at 33-34 (Emphasis added).

> Such computation anomalously caused the statute of limitations to begin before a cause of action existed under RICO.

Id. at 34.

> At a minimum, the statute of limitations for a RICO claim cannot commence until the cause of action has accrued.

Id. at 34-35.

> Ignoring the requirement of a pattern of racketeering activities, the court assumed that Malley-Duff could have brought a RICO claim immediately after its fraudulent termination, *the first predicate act.*

Malley-Duff Supplemental Brief, p.2. (Emphasis added).

> As noted above, and in Appellant's principal Brief, the District Court inexplicably seized upon Malley-Duff's mail fraud allegations as if plaintiff could have commenced a RICO action at the time of its termination. Judge Bloch computed the statute of limitations from that date *even though no cause of action under RICO had accrued.*

Id. at 8 (Emphasis added).

All of the above admissions of Malley-Duff were made in its Briefs to the Third Circuit on the summary judgment issue. We agree with these statements that no RICO cause of action had accrued in February of 1978.

Subsections (a), (b), (c) and (d) of § 1962 of RICO all require a "pattern of racketeering activity." *United States v. Elliott,* 571 F.2d 880, 903 (5th Cir.), *cert. denied* 439 U.S. 953 (1978); *Temporaries, Inc. v. Maryland Nat'l Bank,* No. Y-84-4516 (D.C. Md. June 6, 1986); *Eaby v. Richmond,* 561 F. Supp. 131, 134 (E.D. Pa. 1983).

At Footnote 14 of *Sedima, supra,* page 3285, this Court said:

> As many commentators have pointed out, the definition of a 'pattern of racketeering activity' differs from the other provisions in § 1961 in that it states that a pattern "*requires at least two acts of racketeering activity,*" § 1961(5) . . . . The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report

> explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." (Emphasis added).
>
> Section 1964 of RICO states, in pertinent part:
>
> Any person injured in his business or property *by reason of a violation of Section 1962 of this chapter* may sue therefor in any appropriate United States District Court . . . (Emphasis added).

Since *Sedima,* a number of courts have attempted to take a fresh look at what constitutes a pattern. Because RICO requires a minimum of two predicate acts, under even the most liberal of these new concepts of pattern, one admitted predicate act cannot constitute a pattern.

One concept of pattern recognizes that a "pattern" connotes a multiplicity of events:

> Surely the continuity inherent in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'

Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828, 831 (N.D. Ill. 1985) (Emphasis in original).

The *Inryco* court suggested that a pattern requires more than a single scheme, *Id.* at 833, and, like *Sedima,* emphasized the "continuity plus relationship" concept. *See also, Allright Missouri, Inc. v. Billeter,* 631 F. Supp. 1328 (E.D. Mo. 1986); *Allington v. Carpenter,* 619 F. Supp. 474 (D.C. Cal. 1985); *Professional Assets Management,*

Inc. v. Penn Square Bank, 616 F. Supp. 1418 (W.D. Okla. 1985).

In *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986), the Eighth Circuit also adopted the *Inryco* position that several predicate acts comprising one continuing scheme was insufficient to constitute a pattern, especially when there was no proof that the defendants had ever done these activities in the past, or that they were engaged in criminal activities elsewhere. *Id.* at 257.[3]

Put simply, RICO requires, at a minimum, two predicate acts. This Court said, ". . . [T]he compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, . . ." *Sedima,* 105 S. Ct. at 3286. Because there had been only one alleged predicate act at the time Malley-Duff's agency agreement was terminated, its business had not been injured by a *pattern of racketeering activity* and, therefore, no RICO cause of action had accrued.

Alleged acts that occurred after the termination, such as alleged fraudulent nonpayment of renewal commissions, do not give Malley-Duff a RICO cause of action for the alleged injury that occurred on February 11, 1978.[4]

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[3]Malley-Duff admits that Agency Holding was appointed as general agent in Chicago and Cleveland prior to the termination of the Malley-Duff agency in Pittsburgh. The inability of Malley-Duff to identify predicate acts, other than the alleged August, 1977 letter, in connection with its termination, or predicate acts in the acquisition of other agencies prior to its termination, underscores the frivolousness of its RICO claim.

[4]In fact, in the lengthy trial of *Malley-Duff I,* in which similar allegations were made, its counsel agreed that it had presented no evidence of failure to pay the proper vested renewal commissions and that issue did not go to the jury.

To claim that subsection (d) of 18 U.S.C. § 1962 (the conspiracy subsection) permits the combining of a predicate act which causes injury with acts subsequently occurring, in order to constitute a pattern, would also run counter to the ground upon which the holding of the Third Circuit in *Wells v. Rockefeller*, 728 F.2d 209 (3rd Cir. 1984), *cert. denied* _____ U.S. _____, 105 S. Ct. 2343 (1985) proceeded. *See also, Zenith Radio Corp. v. Hazeltime Research, Inc.*, 401 U.S. 321, 338-39 (1971). In *Wells*, the Third Circuit held that in a civil conspiracy case (these RICO claims are alleged to be a civil conspiracy, not a criminal conspiracy) the actual injury is the focal point for statute of limitations purposes.[5] "For each act causing injury, a claimant must seek redress within the prescribed limitations period." *Wells*, 728 F.2d at 217. *Wells* rejects the rule that the limitations period begins on the commission of the last overt act of the conspiracy and applies the rule that the period runs from each overt act causing damage.

The principal damage alleged by Malley-Duff was the termination of the agency. By Malley-Duff's own admission, the only predicate act alleged that preceded the termination of the agency was the so-called bogus quota letter of August 19, 1977. Because RICO requires that at least two predicate acts of racketeering activity have occurred prior to the damage, no RICO claim has been or can be stated as to the damages caused by termination of the agency.

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[5]There is a split of authority on when the limitations period for a civil conspiracy commences. Contrary to the Third Circuit, the Eighth Circuit applies the rule used in criminal cases, that is, the limitations period begins on the commission of the last overt act of the conspiracy. *White v. Bloom*, 621 F.2d 276, 281 (8th Cir.), *cert. denied* 449 U.S. 995, 101 S. Ct. 533, 66 L.Ed.2d 292 (1980). Thus, a grant of certiorari will also provide the court an opportunity to clarify this matter.

Malley-Duff has already sued these Petitioners and others under antitrust and common law interference claims. Just because it does not have a RICO cause of action in connection with the termination of the agency, does not mean that it does not have recourse if it can establish either antitrust or common law grounds for recovery.

III. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH *CELOTEX CORPORATION v. CATRETT* AND *ANDERSON V. LIBERTY LOBBY, INC.*, IN THAT IT RELIES UPON PLEADINGS IN THE MALLEY-DUFF COMPLAINT TO ESTABLISH A PATTERN OF RACKETEERING ACTIVITY IN THE FACE OF A SUPPORTED MOTION FOR SUMMARY JUDGMENT.

The Third Circuit stated that "According to the Complaint, the enterprise used similar means to acquire Crown Life agencies in Chicago, Peoria, Cleveland, Newark, Hartford, Denver and elsewhere" (A-4). "The Complaint relies on multiple violations of the federal mail and wire fraud statutes . . . to establish the necessary element of a 'pattern of racketeering activity.' " (A-6, n.3). In reversing the District Court grant of summary judgment the Third Circuit held, ". . . . Malley-Duff's allegations of similar conduct in Cleveland, Chicago and other cities seems to us a sufficient pleading of a 'pattern' of racketeering injury" (sic) (A-27, n.20).

However, because Malley-Duff failed to identify in opposition to the motion for summary judgment any predicate act in connection with the acquisition of any other agency, the Third Circuit's reliance on the pleadings is inconsistent with this Court's recent holdings in *Celotex*

Corporation v. Catrett, ____ U.S. ____, 106 S. Ct. 2548, 54 U.S.L.W. 4775 (U.S. June 25, 1986), and *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____, 106 S. Ct. 2505, 54 U.S.L.W. 4755 (U.S. June 25, 1986).

An initial observation is necessary before this inconsistency can be addressed. Although paragraph 21(f) of Malley-Duff's Complaint alleges various *Malley-Duff I* lawsuit related conduct, the Third Circuit wisely did not rely on these allegations in reversing the District Court's grant of summary judgment for alleged termination injuries. First, Malley-Duff has offered no evidence that the conduct alleged involved Crown or Lloyd, the present Petitioners, or that Crown or Lloyd conspired or associated with the other defendants with regard to them.[6] It is apparent that these alleged acts were not acts of the alleged enterprise, but at most, were independent and isolated acts of a few defendants. Secondly, the lawsuit conduct cannot pass the "continuity plus relationship" test if one attempts to construe it with the one alleged pre-termination predicate act into a pattern. The alleged impetus for the lawsuit conduct was the lawsuit itself. Thus, one would have to characterize the lawsuit conduct as so "isolated," "sporadic" and without the threat of "continuing activity" that in conjunction with the August, 1977 letter it could not constitute a pattern of racketeering activity.

In *Celotex*, this Court stated that:

> . . . [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails

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[6]District Court Judge Alan N. Bloch specifically charged the jury in the trial of *Malley-Duff I* that there was no evidence connecting Crown or Lloyd with the destruction of any evidence (Trial Transcript of April 14, 1983, p. 3264).

> to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 54 U.S.L.W. at 4777.

One of the essential elements of a RICO claim is that the conduct of the enterprise be through a *pattern* of racketeering activity. *Sedima,* 105 S. Ct. 3285. At a minimum, RICO requires Malley-Duff to establish the existence of two predicate acts sufficiently related to constitute a pattern. Malley-Duff's response to the motion for summary judgment is insufficient in this regard.

Nowhere in the relevant portion of the Complaint[7] is it alleged that any specific predicate act was committed in connection with the acquisition of any other Crown

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[7]Paragraph 21 of the Complaint states in relevant part that:

> defendants conspired to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through the following acts of racketeering:
>
> (a) through the use of the mail and wire communications and by traveling in interstate and foreign commerce, defendants combined and conspired to acquire various Crown agencies, including plaintiff's, by false and fraudulent means and pretenses. On or about August 19, 1977, defendant, Crown, through Lloyd and Craig, imposed a production quota upon plaintiff for the fiscal year ending December 10, 1977. The production quota, however, was impossible to meet as defendants intended. The sole purpose for imposing the sham quota was to enable Crown, Lloyd, Craig and the remaining defendants to terminate plaintiff and to acquire its business;
>
> (b) when plaintiff's sales failed to meet the bogus quota, defendants, through the use of the mail and wire communications and by traveling in interstate and foreign commerce, terminated plaintiff and seized its business and goodwill without compensation;
>
> (c) as a consequence of the aforesaid acts, money and other financial remunerations gathered from plaintiff's business have

(Continued on next page)

agency. Subparagraph (e) only makes the sweeping allegation that similar acts occurred in the alleged defrauding of other agencies, and reliance by the Third Circuit on this pleading alone is insufficient under *Celotex* to defeat a motion for summary judgment. "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), *except the mere pleadings themselves . . .*" *Id.* at 4777 (Emphasis added).

In *Celotex,* this Court held that there was no requirement in Fed.R.Civ.P. 56 that ". . . the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* (Emphasis in original). Nevertheless, in Agency Holding's motion for summary judgment (D-1), adopted by Crown Life and Lloyd, Agency Holding supported its motion in keeping with the strict standards outlined by the dissenting Justices in *Celotex. Id.* at 4779. Agency Holding presented credible evidence that would entitle it to a directed verdict if not controverted. Agency Holding attached affidavits and, more particularly, excerpts of testimony, given at the injunction hearing in the equity suit brought by Malley-Duff against Crown Life

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(Continued)

been distributed among defendants and in interstate commerce through the use of the mails by defendants;

(d) under its agreement with Crown, plaintiff is entitled to receive renewal commissions for premiums paid on policies sold by plaintiff before it was terminated. By and through the use of the mail, defendants conspired to and did cause renewal commissions to be transferred from plaintiff to one or more defendants; and

(e) through acts similar to those averred in subparagraphs (a)-(d), defendants acquired Crown agencies and defrauded the terminated general agents out of renewal commissions in Chicago, Illinois, Peoria, Illinois, Cleveland, Ohio, Newark, New Jersey, Hartford, Connecticut, Denver, Colorado and elsewhere.

and Lloyd, on the facts surrounding the termination of Malley-Duff and the establishment of Agency Holding in Chicago (D-15 thru 79).

The testimony regarding the termination challenged Malley-Duff's allegation in its Complaint that the August 19, 1977 letter was false or fraudulent. The testimony shows that the letter was exactly what it purported to be—a truthful statement that Crown required Malley-Duff to perform at a level more in keeping with its and the Pittsburgh market's potential (D-44 thru 46, 50). Any reliance on the letter by Malley-Duff would not have caused it injury, but rather would have saved its agency relationship with Crown Life. Thus, the one alleged predicate act by the defendants was not a predicate act at all.

Malley-Duff's bare allegation in the Complaint concerning "similar" false and fraudulent acts in the acquisition of other agencies was also put in issue. Malley-Duff did not attempt to go beyond the pleadings to establish that there existed a genuine issue of fact or law concerning whether the letter was false or fraudulent and, more importantly, it failed to indicate any other "similar" act in connection with other agencies.

Agency Holding went even further. In its motion for summary judgment, it also included sworn testimony that its acquisition of the Chicago general agency was not, contrary to the allegation of the Complaint, the result of a termination at all, but rather followed the death of Crown's previous general agent and, thus, could not have involved and did not involve a "similar" quota letter (D-40, 41).

In addition, Malley-Duff conceded in its Brief in Opposition to the motion for summary judgment that the acquisition of the Chicago and Cleveland agencies

occurred prior to its own termination. By admitting that the August, 1977 letter was the only pretermination predicate act, Malley-Duff admitted that no predicate act occurred with respect to Chicago or Cleveland. Because no other "similar" act was ever identified, Appellees could have done no more to support its motion for summary judgment.

In the face of this supported motion for summary judgment, Malley-Duff could not have rested upon the mere allegations in its Complaint. *Celotex,* 54 U.S.L.W. at 4777; *Anderson v. Liberty Lobby, Inc.,* 54 U.S.L.W. at 4759; *Ness v. Marshall,* 660 F.2d 517 (3rd Cir. 1981); *Fireman's Insurance Company of Newark v. Dufresne,* 676 F.2d 965 (3rd Cir. 1982). Because Malley-Duff has the burden of proof at trial, it should have filed affidavits or othe similar materials identifying the acts that it claims established the alleged pattern. It has, to date, failed to identify by affidavit or otherwise any alleged similar predicate act in connection with the acquisition of any other general agency by the defendants which occurred either before or after its termination. Consequently, it was error for the Third Circuit to rely upon the allegations of Malley-Duff's Complaint and to hold that Malley-Duff had shown a RICO violation sufficient to successfully oppose the motion for summary judgment.

CONCLUSION

For the reasons hereinabove set forth and on the authorities herein cited, we respectfully submit that a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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CERTIFICATE OF MEMBERSHIP

It is hereby certified that all of the attorneys whose names appear below are members of the bar of this Court.

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86-531

No.

Supreme Court, U.S.
FILED
SEP 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3228

MALLEY-DUFF & ASSOCIATES, INC.
Appellant

v.

CROWN LIFE INSURANCE CO., a Corp.
AGENCY HOLDING CORP, an Illinois Corp.
AGENCY HOLDING CORP, an Ohio Corp.
CLARKE BURTON LLOYD, individual
KERRY PATRICK GRAIG, individual
DIANE PARIANO, individual
EHRMAN RATINI OGLEVEE & CRAIG INC., a Pennsylvania Corporation
ROBERT OGLEVEE, individual

On Appeal from the United States
District Court for the Western
District of Pennsylvania
(D.C. Civ. No. 81-439)

Argued: November 19, 1985

Before: HIGGINBOTHAM, SLOVITER and MANSMANN, *Circuit Judges.*

(Filed May 30, 1986)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This is an appeal from a final summary judgement of the district court dismissing the complaint of appellant Malley-Duff & Associates, Inc. ("Malley-Duff"). For the reasons that follow, we will reverse and remand for further proceedings.

I.

Until February 13, 1978, Malley-Duff was an agent of defendant Crown Life Insurance Company ("Crown Life") for a territory surrounding and including Pittsburgh, Pennsylvania. Crown Life required Malley-Duff to represent it exclusively. Malley-Duff alleges that defendants formed an "enterprise," the purpose of which was "to acquire, take over or eliminate various Crown agencies that had lucrative territories in the United States of America," and

which did so by "false and fraudulent means and pretenses." The enterprise allegedly acquired Malley-Duff's agency by first inposing, nine months into the fiscal year 1977, a "bogus" production quota that could not be met, and then terminating the agency when it in fact failed to meet the quota. According to the complaint, the enterprise used similar means to acquire Crown Life agencies in Chicago, Peoria, Cleveland, Newark, Hartford, Denver, and elsewhere. It is further alleged that terminated agents were defrauded out of renewal commissions.

In April of 1978, Malley-Duff filed suit (*"Malley-Duff I"*) against defendants Crown Life, Lloyd, Craig, Agency Holding Company (Illinois), and Agency Holding Company (Ohio), as well as another individual not named in this suit, alleging violations of the federal antitrust laws and conspiracy to tortiously interfere with contract. The case was tried to a jury, but defendants won a directed verdict on the antitrust claims at the close of Malley-Duff's case. Malley-Duff won a verdict of $900,000 on the state conspiracy claim, but the jury concluded in answer to a special interrogatory that there was no tortious interference. On appeal, this court ordered a new trial, holding that there was sufficient evidence of a violation of § 1 of the Sherman Act to present a jury issue, and "that the verdict from answers on the remaining state law claims were inconsistent." *Malley-Duff & Associates v. Crown Life Insurance Company,* 734 F.2d 133, 136 (3d Cir.), *cert. denied,* 105 S. Ct. 564 (1984).

On March 20, 1981—prior to trial of *Malley-Duff I*—Malley-Duff filed the instant complaint, alleging causes of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982),[1]

[1]18 U.S.C.§ 1964(c) creates a private cause of action:

(Continued on next page)

for conspiracy to interfere with civil rights, 42 U.S.C. § 1985,[2] and a pendent state civil conspiracy theory. The RICO claims can be divided into two categories: (1) claims arising out of the allegedly fraudulent termination of the

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(Continued)

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1962 outlaws (a) the use of income derived from "a pattern of racketeering activity" or through the collection of an "unlawful debt" (defined at 18 U.S.C. § 1961(6)) to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce, (b) the acquisition or maintenance of any interest in an enterprise through a pattern of racketeering activity or collection of an unlawful debt, (c) conducting or participating in the conduct of an enterprise through a pattern of racketeering activity or collection of unlawful debt, and (d) conspiring to violate any of these provisions. Malley-Duff's complaint contained counts based on each of the four subsections.

"Racketeering activity" is defined in 18 U.S.C. § 1961(1) as any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, any "offense" involving bankruptcy or securities fraud, and drug-related activity that is "punishable" under federal law.

A "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of whcih occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5).

[2]This section provides in relevant part:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or withness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

agency;[3] and (2) claims arising out of alleged obstructions of justice by defendants in the course of the discovery phase of *Malley-Duff I*.[4] The § 1985 claims were based on the same allegedly obstructive conduct. The civil conspiracy count incorporated allegations involving both the termination and the obstructions of justice.

This case was consolidated with *Malley-Duff I* on November 2, 1981, but was severed on January 11, 1983, prior to trial. Defendants had filed a motion for summary judgement on July 29, 1982. On March 23, 1984, the district court granted defendants motion and entered judgement for them on all counts. This appeal followed.[5]

II.

The district court dismissed Malley-Duff's RICO claims, to the extent they arose out of the allegedly fraudulent termination of its agency, on the ground that they were barred by the applicable statute of limitations. Because federal law does not provide a statute of limitations for civil RICO actions, the district court followed the settled practice of turning to the law of the forum state (in this case Pennsylvania) to "borrow" the limitations period for the state cause of action most closely analogous to

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[3]The complaint relies on multiple violations of the federal mail and wire fraud statutes. 18 U.S.C. §§ 1341, 1343, to establish the necessary element of a "pattern of racketeering activity."

[4]These allegations invoke 18 U.S.C. § 1503 (obstruction of justice), another RICO "predicate act." Specifically, the complaint alleges subornation of perjury, destruction of documents, interference with a United States Marshal, perjury, witness intimidation, and an attempt to blackmail the district judge originally assigned to *Malley-Duff I*.

[5]This appeal was initially listed for disposition on December 7, 1984, but was removed from the list for the purpose of supplemental briefing on issues raised by Sedima, S.P.R.L. v. Imrex Co., ____ U.S. ____, 105 S. Ct. 3275 (1985) and Wilson v. Garcia, ____ U.S. ____, 105 S. Ct. 1938 (1985).

Malley-Duff's claims.[6] *See Board of Regents v. Tomanio,* 446 U.S. 478, 483-84 (1980); *Johnson v. Railway Express Agency,* 421 U.S. 454, 462-63 (1975); *see generally* Note, *Limitation Borrowing in Federal Courts,* 77 Mich. L. Rev. 1127 (1979). The parties agreed that common law fraud was the state cause most analogous to these claims, but disagreed as to whether a two-or six-year limitations period governed such actions in Pennsylvania.[7] The district court held that the two-year statute applied, and that

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[6]As the late Judge Henry Friendly once wrote:

> It has also been long established that when Congress created a federal right but did not prescribe a period for its enforcement, federal courts will borrow the period of limitation prescribed by the state where the court sits. . . . The basis of this was that Congress could not have intended an unlimited period for enforcement as would otherwise exist in actions at law, and that, selection of a period of years not being the kind of thing judges do, federal judges should borrow the limitation statutes of the states where they sit.

Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961).

[7]There is no dispute that, prior to 1978, fraud actions were governed by a six-year statute, and that 1982 amendments to the Pennsylvania Judicial Code make it clear that such actions are now subject to a two-year limitation. *See* 42 Pa. Cons. Stat. Ann. § 5524(7) (Purdon Supp. 1985). The question of which period applied during the intervening period, when this action was filed, has been the subject of considerable litigation. *See, e.g.,* Vosbikian v. Wasserstrom, No. 84-4674 (E.D. Pa. 1985) (available on LEXIS, Genfed library, Dist file) (six years); Bernicker v. Pratt, 595 F. Supp. 1034 (E.D. Pa. 1984) (six years); Ferber v. Morgan Stanley Co., CCH Fed. Sec. L. Rep. ¶99,634 (E.D. Pa. 1984) (two years); Fickinger v. C-1 Planning, Inc., 556 F. Supp. 434 (E.D. Pa. 1982) (two years); Culbreath v. Simone, 511 F. Supp. 906 (E.D. Pa. 1981) (six years), *See also* Fiebach & Doret. *A Quarter Century Later - The Period of Limitations for Rule 10b-5 Damage Actions in Federal Courts Sitting in Pennsylvania,* 25 Vill. L. Rev. 851, 855-56 n.26 (1980) (six years). Because we decline to use the fraud analogy, *infra,* we need not reach this issue.

claims filed on March 20, 1981, relating to events that occurred in early 1978,[8] were therefore time-barred.

Subsequent to the district court's decision, the Supreme Court of the United States decided *Wilson v. Garcia*, ____ U.S. ____, 105 S. Ct. 1938 (1985), which established a three-part inquiry[9] to guide the selection of the statute of limitations that will govern a federal claim. First, we must determine whether it is state or federal law that controls the characterization of the claim. Second, we must decide whether all claims arising under a particular federal law "should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." Finally, "we must characterize the essence of the claim in the pending case, and decide which state statute provides that most appropriate limiting principle." 105 S. Ct. at 1943. In the subsections that follow we engage in the prescribed inquiry.[10] Our function here is to legislate interstitially, and in doing so we are

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[8]A large part of the briefing and argument in this matter has been devoted to the difficult issue of when the RICO claims accrued. This relates to Malley-Duff's contention that even if a two-year limit applies, its claims are timely. Because we adopt a six-year period, *infra*, and it is clear that all conduct complained of occurred within that period, we do not reach the accrual issue.

[9]The Court cited no precedent for the three-part inquiry, and its origins are unclear. 105 S. Ct. at 1943. There is nothing in the opinion, however, that would suggest that the approach is unique to § 1983 cases. Indeed, it appears to us that the Court intended to mark out a general approach to all statute of limitations borrowing problems.

[10]This court has held in two cases that *Wilson v. Garcia* should be applied retroactively in § 1983 cases. *See* Smith v. City of Pittsburgh, 764 F.2d 188 (3d Cir.), *cert. denied*, 105 S. Ct. 349 (1985); Fitzgerald v. Larson, 769 F.2d 160 (3d Cir. 1985). In Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), we applied *Wilson v. Garcia* retroatively to a claim brought under 42 U.S.C. § 1981. These results followed from the uncertainty that existed with regard to the applicable limitations period

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mindful of Justice Holmes, admonition that we are "confined from molar to molecular motions." *Southern Pacific Co. v. Jenson,* 244 U.S 205, 221 (1917) (dissent). We conclude that within each state all civil RICO claims should be characterized uniformly, in accordance with federal law, and that in Pennsylvania the most appropriate limitations period for all civil RICO claims is the six-year residual statute of limitations.

A. Controlling Law

In *Wilson v. Garcia,* which arose in New Mexico, the question whether state or federal law controlled the characterization of § 1983 claims was critical because the Supreme Court of New Mexico had definitively decided, as a matter of state law, that § 1983 claims should be analogized for limitations purposes to state claims brought under the New Mexico Torts Claim Act. *DeVargas v. New Mexico,* 97 N.M. 563, 642 P.2d 166 (1982). The United States Supreme Court held that *DeVargas* was not binding on federal courts. The Court noted that the "characterization of § 1983 for statute of limitations purposes is derived from the elements of the cause of action, and Congress purpose in providing it. These, of course, are matters of federal law. Since federal law is available to decide the question, the language of [42 U.S.C.] § 1988 directs that the matter of characterization should be treated as a federal question." 105 S. Ct. at 1943. The court found further support in § 1988's[11] instruction that state law shall apply

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(Continued)

under Pennsylvania law prior to these cases, making it not inequitable to apply *Wilson* retroactively. *See* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Given the even greater uncertainty that has existed with regard to the applicable limitations period in this case, *see also* footnote 7 *supra, Wilson v. Garcia* should, *a fortiori,* apply here.

[11]Section 1988 provides in relevant part:

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"so far as the same is not inconsistent with" federal law, observing that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." 105 S. Ct. at 1944. In addition, the Court stated, "[i]n borrowing statutes of limitations for other federal claims, this Court has generally recognized that the problem of characterization 'is ultimately a question of federal law." *Id.* (quoting *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966)) (footnote omitted).

We have found no decisions of the Pennsylvania Supreme Court, or any lower court, purporting to characterize RICO claims under Pennsylvania law for limitations purposes. Nonetheless, if state law were to control the chartacterization our function would be to predict how the Pennsylvania Supreme Court would act, rather than to apply the principles developed by the U.S. Supreme Court in *Wilson v. Garcia* and other "borrowing" decisions. Thus, we cannot overlook this issue. Fortunately, we believe the resolution is quite clear. Though we cannot

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(Continued)

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guility.

rely, as the Court did, on § 1988, we note that its borrowing principles are not unique—the confluence of the Supremacy Clause and the Rules of Decision Act produce the same result in other cases: "If... federal law is both pertinent and valid, it applies because the supremacy clause of the Constitution so commands; if the federal law is impertinent or invalid, state law applies because Congress has so directed." Western & Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 Mich. L. Rev. 311, 316 (1980). Moreover, the federal interests in uniformity and having "firmly defined, easily applied rules," emphasized in *Wilson v. Garcia,* 105 S. Ct. at 1944 (quoting *Chardon v. Fumero Soto,* 462 U.S. 650, 667 (1983)(Rehnquist, J., dissenting)) apply with as much force to RICO as to other federal causes, such as § 1983, § 301 of the Labor Management Reporting Act, *see Auto Workers, supra,* or the federal antitrust laws, *see* Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 83-84 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961), *Wilson v. Garcia,* 105 S. Ct. at 1944 n.19. We conclude that federal law controls characterization of RICO claims for limitations purposes.

B. Uniform or Particularized Characterization?

In characterizing Malley-Duff's termination-related RICO claims as analogous to claims for common law fraud, the parties and the district court have followed the settled borrowing practice within this Circuit of parsing the particular factual allegations and legal theories supporting an individual federal claim, rather than looking to the federally-created cause of action for a broader analogy that could encompass all claims brought thereunder in a given state. In *Wilson v. Garcia* Garicia the Supreme Court adopted the latter approach in the context of § 1983 cases, and we believe that their reasoning suggests that the same approach should be followed with civil RICO.

In *Wilson v. Garcia* the Court noted that the practice of borrowing state statutes of limitations promotes the policy of repose, but that

> when the federal claim differs from the state cause of action in fundamental respects, the State's choise of a specific period of limitation is, at best, only a rough approximation of "the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

105 S. Ct. at 1945 (quoting *Johnson v. Railway Express Agency,* 421 U.S. at 463-64). Section 1983, the Court stated, "can have no precise counterpart in state law . . . [A]ny analogies to those causes of action are bound to be imperfect." *Id.* (footnote omitted).

> In this light, practical considerations help to explain why a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose. The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983, Almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations. . . .
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> . . . If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim. Moreover, under such an approach different statutes of limitations would be applied to the various § 1983 claims arising in the same State, and multiple periods of limitations would often apply to the same case.

> There is no reason to believe that Congress would have sanctioned this interpretation of its statute.

105 S. Ct. at 1945-46 (footnotes omitted).[12] The Court also expressed a concern that the somewhat arbitrary selection of one analogy over another can appear result-oriented, and thereby undermine the appearance of neutral justice. 105 S. Ct. at 1945 n.24. The Court concluded that "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach" of selecting "in each State, the one most appropriate statute of limitations for all § 1983 claims." 105 S. Ct. at 1947.

Civil RICO is as far removed from any traditional state cause of action as is § 1983.[13] This is well-illustrated by *Durante Brothers and Sons v. Flushing National Bank*, 755 F.2d 239 (2d Cir.), *cert. denied*, 105 S. Ct. 3530 (1985), where the Court of Appeals rejected the district court's choice of a state statute of limitations for actions to recover an overcharge of interest in a RICO case predicated on collection of an unlawful debt. The court pointed out that the seemingly apt analogy dissolved when the elements of the RICO claim were closely examined:

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[12]This court had followed the case-specific approach rejected by the Supreme Court in *Wilson v. Garcia*. *See* Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974)(in banc).

[13]We do not suggest that civil RICO is a uniquely federal remedy in the same sense as § 1983. A state could, as some have, create a private cause of action substantially similar to civil RICO. *See* Wright, *A Look at State RICO Statutes in RICO: Expanding Uses in Civil Litigation* (1984). Pennsylvania's RICO-type statute, 18 Pa. Cons. Stat. Ann. § 911 (Purdon 1983), however, does not provide for a private cause of action. *See* D'lorio v. Adonizio, 554 F. Supp. 222, 232 (M.D. Pa. 1982). Though we do not have occasion to so decide, we note that where a state has created a private cause of action substantially similar to the federal civil RICO action, the state limitations period controlling such actions might be an appropriate choice for the federal courts to borrow, provided the period is not so short as to contravene federal policies.

> In the context of the allegations made here, therefore, success on these counts would require proof that, *inter alia,* (1) there was a RICO enterprise, (2) its activities affected interstate commerce, (3) the individual defendants were employed by or associated with the enterprise, (4) the Bank used, in the operation of the enterprise, income derived from the collection of unlawful debt, and (5) the individual defendants participated in the conduct of affairs of the enterprise through the collection of unlawful debt. 18 U.S.C. § 1962(a) and (c). In addition, to prove that what was collected was an unlawful debt within the meaning of RICO, Durante would have to show that (6) the debt was unenforceable in whole or in part because of state or federal laws relating to usury, (7) the debt was incurred in connection with "the business of lending money . . . at a [usurious] rate," and (8) the usurious rate was at least twice the enforeable rate. *Id.* § 1961(6). And Durante would have to show that (9) as a result of the above confluence of facts, (10) it was injured in its business or property. *Id.* § 1964(c).

755 F.2d at 248.

The court went on to state:

> The above listing of elements that must be proven in order to establish civil RICO liability for collection of an unlawful debt makes clear that the civil RICO action is not simply an action to recover excessive interest or to enforce a penalty for the overcharge. RICO is concerned with evils far more significant than the simple practice of usury. . . . In contrast, a state law claim . . . could be established without proof of nine of the ten listed elements of the civil RICO claim.

755 F.2d at 248-49. We believe a similar analysis would apply to any RICO claim. Concepts such as RICO 'enterprise" and "pattern of racketeering activity" were simply unknown to common law, and all federal crimes contain

jurisdictional and other elements irrelevant to any state civil action. Thus, as with § 1983, any analogies to traditional state causes of action "are bound to be imperfect." *Wilson v. Garcia,* 105 S. Ct. at 1945.

This case provides abundant evidence that a particularized approach to borrowing statutes of limitations "inevitably breeds uncertainty and time-consuming litigation." Even RICO claims based on "garden variety" business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods. A state may even have different limitations periods for common law fraud and securities fraud. *See also Eisenberg v. Gagnon,* 564 F. Supp. 1347, 1353-54 (E.D. Pa. 1983), *rev'd in part,* 766 F.2d 770 (3d Cir.), *cert. denied,* 106 S. Ct. 343 (1985). More extreme cases might include allegations sounding in assault, battery, false imprisonment, infliction of emotional distress, abuse of process, or trespass to land or chattels. The fact that RICO requires at least two predicate acts in all cases makes it even more likely that more than one analogy will have force in a given case.[14] "The current approach is virtually guaranteed to incite complex and expensive litigation over what should be a straightforward

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[14]The statutory definition of 'racketeering activity,' 18 U.S.C. § 1961(1) contains a laundry list of federal and state offenses. Unless the two alleged predicate acts are closely related, . . . it is unlikely that both acts could be subject to the same statute of limitations. Under these circumstances, the federal court would be saddled with the unenviable task of selecting one of the two disparate limitations periods. Defendants would solve this dilemma by requiring the court to determine which predominates the complaint. Such a process could be arbitrary at best, and this Court is unwilling to engage in such capricious selections. Morley v. Cohen, 610 F. Supp. 798, 809 (D. Md. 1985).

matter." A.B.A Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Civil RICO Task Force* 391-92 (1985) [hereinafter cited as "*Task Force Report*"].[15]

In *Wilson v. Garcia* the Court stated that "the legislative purpose to create an effective remedy for an enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." 105 S. Ct. at 1947 (footnote omitted). Like § 1983, civil RICO was intended to be a useful remedial device and a supplement to criminal law enforcement in an area peculiarly in need of federal intervention. *Sedima,* 105 S. Ct. at 3286. As today's cases demonstrate, its effectiveness can be substantially thwarted by uncertainty, with the concommitant dissipation of legal resources. We hold, then, that in borrowing state limitations periods for civil RICO claims courts must select, in each state, the *one* most appropriate statute of limitations for *all* civil RICO claims. *See also Electronic Relays v. Pacente,* 610 F. Supp. 648 (N.D. Ill. 1985); *Victoria Oil v. Lancaster Corp.,* 587 F. Supp. 429 (D. Colo. 1984). *But see Silverberg v. Thomson McKinnon Securities,* No. 85-3349 (6th Cir. April 10, 1986).

C. The Applicable Limitations Period

The final stage in our inquiry is the selection of the one Pennsylvania limitations period that will govern all civil RICO actions arising there. This process of characterization cannot take place in a vacuum—it would accomplish nothing to characterize civil RICO in a way that does

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[15]This report was issued March 28, 1985 by a five member task force. It is neither approved by the A.B.A. nor does it represent the A.B.A.'s official position. It was, however, cited extensively by both the majority and dissenters in *Sedima.*

not correspond to any existing Pennsylvania statute of limitations. Rather, we must, as the Supreme Court did in *Wilson v. Garcia,* choose the best out of the available candidates. We have been greatly aided in this process by the parties' thorough supplemental briefing.

In *Wilson v. Garcia,* the Supreme Court chose a state limitations period for "personal injury" actions to govern § 1983 cases in New Mexico.[16] Given that the Court had earlier conceded that characterization "will often be somewhat arbitrary," 105 S. Ct. at 1946 n.24, it should not be surprising that the Court did not present a very detailed rationalization for its choice. Nonetheless, there is some guidance to be extracted from their discussion.

The Court noted that "[t]he atrocities that concerned Congress in 1871 plainly sounded in tort." 105 S. Ct. at 1948. Of the potential tort analogies, the Court stated that

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[16]The Court was careful to acknowledge that its approach would only achieve uniformity within each state. Though this can, in part, be a result of the fact that states will prescribe different periods of years for the same actions, the Court must also have been aware that a characterization useful in one state may find no counterpart in others. As Justice O'Connor pointed out in dissent, 105 S. Ct. at 1953, on the very day the Tenth Circuit decided *Wilson v. Garcia,* it also held that the personal injury characterization found no counterpart in Colorado's limitations scheme, and therefore adopted a different characterization and borrowed the catchall limitations period for actions on a statute. McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984)(in banc). In still another case decided the same day, the Tenth Circuit borrowed a four-year statute of limitations which applies to actions for relief "not otherwise provided for by law" for § 1983 actions arising in Utah, Mismash v. Murray City, 730 F.2d 1366 (10th Cir. 1984)(in banc), *cert. denied.* 105 S. Ct. 2111 (1985). Thus, Judge Sloviter's concurrence in A.J. Cunningham Packing Corp. v. Congress Financial Corp., Nos. 85-3366 & 85-3380, is not correct in stating that the "absence of an available 'catch all' in all states" distinguishes this case from *Wilson v. Garcia.* Our choice of a characterization for civil RICO actions in Pennsylvania does not preclude choice of a different approach in other states within this Circuit. *See* footnote 13 *supra,* regarding State RICO statues.

"Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." *Id.* The Court's basis for this categorical statement was the language of the fourteenth amendment: "no *person* shall be deprived of life, liberty or property . . . " "A violation of that command is an injury to the individual rights of the person." *Id.* The only other point the Court mentioned as favoring the personal injury characterization was that:

> General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when § 1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.

105 S. Ct. at 1949.

We may also obtain some guidance from the Court's reasons for rejecting two other proposed analogies. First, the Court stated that the "relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many states." 105 S. Ct. at 1948 (also noting that § 1983 enforces constitutional, not only statutory, rights). Second, the Court rejected an analogy to state remedies for wrongs committed by public officials as it was the very inadequacy of such remedies, "that led Congress to enact the Civil Rights Act in the first place." 105 S. Ct. at 1949 (footnote omitted).

With this background, we proceed to consider the merits of various limitations periods available under

Pennsylvania law.[17] The suggested candidates are the limitations periods for common law fraud,[18] for civil penalty or forfeiture, 42 Pa. Cons. Stat. Ann. § 5524 (a "potpourri" two-year statute of limitations), and the "catchall" six-year residual statute of limitations. Clearly, we should not expect an epiphany through which the "essence" of civil RICO is revealed to us. Rather, we can hope for no more than finding a workable rule that is consonant with the purposes of civil RICO, and defensible under reasonably neutral criteria of statutory construction.

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[17]It has also been suggested that this court borrow the Clayton Act's four-year limitation on private treble damage antitrust suits. In DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151 (1983), the Supreme Court held that federal courts should "turn away from state law" and borrow a limitation period from elsewhere in federal law "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making." 462 U.S. at 172.

A number of things can be said in favor of this characterization. RICO was drafted with the antitrust model of crinimal sanctions supplemented by private treble damage actions in mind. Both the Clayton Act and RICO require that private plaintiffs be persons who have been "injured in [their] business or property." 15 U.S.C. § 15(a);18 U.S.C. § 1964(c). Also, both RICO and the antitrust laws deal with a wide range of conduct affecting commerce. Finally, in favor of this characterization, it can be said that it promotes uniformity—not only within a state, but nationally as well.

The factors militating against this characterization are that (1) though RICO and the Clayton Act both require injury to business or property for standing to sue, there is little overlap between the types of *conduct* that are prohibited; and (2) despite the fact that Congress consciously drew upon the antitrust model in drafting RICO, it did not include a comparable statute of limitations period, perhaps indicating a congressional intent that there not be a national standard. We have been cited no relevant legislative history on this point.

On balance, we do not believe the Clayton Act analogy meets the high standard required by *DelCostello* to justify "turning away from state law." *See also Task Force Report* at 385-392.

[18]As noted previously, it is not clear what that period was at the time this case was filed. *See* footnote 7 *supra* and accompanying text.

Fraud

Malley-Duff has suggested that common law fraud would provide a suitable analogy for all civil RICO claims. As one court has stated, however, "it is obvious that the common law fraud analogy falls far short of capturing the multitude of factual bases on which RICO can be based." *Electronic Relays,* 610 F. Supp. at 651. We, too, are reluctant to elevate one predicate act among many to the status of a uniform RICO characterization. Even if it is true, as Malley-Duff argues, that fraud is the predicate act upon which most civil RICO actions are premised, *see also Task Force Report* at 55-56, we must note that this trend has been the subject of increasing disquietude over the federalization of state common law. *See Sedima,* 105 S. Ct. at 3293 (Marshall, J., dissenting); 131 Cong. Rec. S10285-88 (1985) (Remarks of Sen. Hatch). Many current proposals to curtail civil RICO are directed to precisely this point. For example, Senate Bill 1521, 99th Cong., 1st Sess. (1985), would require at least one predicate act other than mail, wire, or securities fraud to make out a civil RICO claim.

Though the suggestion is not without some merit, we think that characterizing RICO as essentially a fraud action would be to have the tail wag the dog. We reject this approach.

Civil Penalty or Forfeiture

It is also suggested that RICO can be broadly analogized to actions for civil penalty or forfeiture. In Pennsylvania such actions are now governed by a two-year statute of limitations, 42 Pa. Cons. Stat. Ann. § 5524(5) (Purdon Supp. 1985), although at the time these cases were brought, it was a one-year period when brought by private parties, 42 Pa. Cons. Stat. Ann. § 5523(2)(1981).

We do not find this analogy forceful. Civil RICO is clearly not a forfeiture statute—the recovery of a successful private plaintiff is based on the injury sustained ("three-fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"), not on what the defendant has gained through illegal conduct. Nor do we think the treble damage provision is primarily intended as a penalty. *See Task Force Report* at 391. More important, it is an incentive for private attorneys general to bring suit. We would also be concerned that the one-year limitations period that would be applicable to this case if the forfeiture analogy were adopted may, because it is so short, contravene the broad *remedial* purposes of civil RICO. We decline to characterize civil RICO as a penal statute.

42 Pa. Cons. Stat. Ann. § 5524

Section 5524 is a two-year statute of limitations, covering a potpourri of civil actions. It provided at the time relevant to this appeal:

> The following actions and proceedings must be commenced within two years:
>
> (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect of or unlawful violence or negligence of another.
>
> (3) An action for taking, detaining or injuring personal property, including actions for specific recov y thereof.
>
> (4) An action for waste or trespass of real property.

(5) An action upon a statute for civil penalty or forfeiture, where the action is given to a government unit.

(6) An action against any officer of any government unit for the nonpayment of money or the nondelivery of property collected upon execution or otherwise in his possession.

It is argued by amicus Congress Financial Corporation that this two-year period should be borrowed for civil RICO because "it is indisputable that almost all, if not all, of the predicate RICO acts . . . would be included, in a civil context, within § 5524."

We find this proposal without merit. The premise that most, "if not all," RICO predicate acts would be covered by this statute is transparently false. Most RICO predicate acts, such as gambling, obstruction of law enforcement, sports bribery, narcotic trafficking, violations of restrictions on payments and loans to unions, interstate transportation of stolen property, or trafficking in contraband cigarettes, simply do not correspond to private causes of action under common law. As one court, seeking to find a civil RICO analogy under Colorado law has stated: "The search for a precise definition may be futile, however, since Colorado's statutes of limitations retain the language of common law forms of action." *Victoria Oil,* 587 F. Supp. at 431.

More fundamentally, this proposal does not even do what *Wilson* commands, i.e., *characterize* the federal cause of action. Rather, it seeks to take advantage of the fortuitous circumstance that a number or potential state law analogies share a common limitations period. Such an approach will provide little guidance for the resolution of this problem in other states, and may prove particularly

vulnerable to changes in the state statute of limitations scheme. We reject this apporoach.

"Catchall" Limitations Period

Like most states, Pennsylvania has enacted a residual "catchall" statute of limitations for actions, primarily based on statute, that are not governed by any more specific period of limitations. It provided at the time this case was filed:

> The following actions and proceedings must be commenced within six years:
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> . . .
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> (6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation).

42 Pa. Cons. Stat. Ann. § 5527 (Purdon 1981).[19] In *Wilson v. Garcia,* the Court considered, but rejected, the application of such a catchall statute to § 1983 claims:

> The relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many states. Section 1983, of course, is a statute, but it only provides a remedy and does not itself create any substantive rights. . . . Although a few § 1983 claims are based on statutory rights, . . . most involve much more. . . . These guarantees of liberty are among the rights possessed by every individual in civilized society, and not privileges extended to the people by the legislature.

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[19]The current catchall provision is the same in all material respects. 42 Pa. Cons. Stat. Ann. § 5527 (Purdon Supp. 1985).

105 S. Ct. at 1948-49 (footnote omitted).

The Court's reasons for rejecting this analogy in the § 1983 context simply do not apply to RICO. RICO was enacted in 1970, long after statutory causes of action and corresponding catchall limitations periods became commonplace. Thus, it would not be disingenuous (or anachronistic) to suggest that Congress might have approved of borrowing such statutes. Second, RICO is a strictly statutory remedy to enforce statutory rights. Thus, *Wilson v. Garcia* does not foreclose this court from adopting § 5527 for civil RICO actions arising in Pennsylvania.

The A.B.A. Task Force on Civil RICO specifically approved of cases characterizing RICO in this way:

> There are two varying approaches to characterizing RICO claims. Most courts use the state limitations period applicable to state law claims most similar to the *predicate offenses* alleged as part of the RICO claim. These cases in effect assume that the thrust of the RICO claim is to compensate injury caused by the underying predicate offenses. In contrast, a few courts view RICO claims more broadly as a special statutory cause of action as to which the predicate offenses are only one element. These courts opt for the use of a state statute, if available, applying generally to all statutory causes of action that have no express statute of limitations.
>
> The latter approach seems more consistent with the overall concept of RICO than the former. RICO is manifestly directed towards activities that go beyond the mere commission of predicate offenses, and many courts have balked at the concept of RICO as simply a new or alternative civil remedy for the underlying criminal violations.

Task Force Report at 389-91 (emphasis in original). *See also Compton v. Ide,* 732 F.2d 1429 (9th Cir. 1984); *Teltronics Services v. Anaconda-Ericsson, Inc.,* 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd,* 762 F.2d 185 (2d Cir. 1985); *Seawell v. Miller Brewing Co.,* 576 F. Supp. 424 (M.D.N.C. 1983). *See also Durante Brothers, supra,* (applying catchall statute to case before court); *Creamer v. General Teamsters Local Union,* 579 F. Supp. 1284 (D. Del. 1984) (same).

Such an approach, moreover, recognizes that civil RICO is truly *sui generis* and that particular claims cannot be readily analogized to causes of action known at common law—the very observation that led us to search for a uniform limitations period in the first place. And like personal injury statutes. the catchall statutes are particularly unlikely to be fixed in a manner that would discriminate against federal claims. Thus, we hold that civil RICO actions arising in Pennsylvania shall be governed by the six-year limitations period of 42 Pa. Cons. Stat. Ann. § 5527. Because it is clear that the acts relating to the termination of Malley-Duff's agency occurred within six years of the time this action was filed, we will reverse the district court's dismissal of the RICO claims arising out of these alleged acts.[20]

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[20]In the wake of *Sedima,* in which both the majority and dissenting opinions stressed the need for courts to develop a meaningful approach to the RICO requirement of a "pattern" of racketeering activity, defendants have argued that, even if timely, Malley-Duff's RICO claims should be dismissed as failing to allege such a pattern. *Sedima* did not, however, give much guidance as to how "pattern" should be interpreted, other than to suggest that "continuity plus relationship" of predicate acts might be required. 105 S. Ct. at 3285 n.14 (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)). We have no occasion to define its parameters here. Even under the very restrictive definition of "pattern" defendants would have us adopt, *see Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986), *Northern Trust Bank/O'Hare v. Inryco, Inc.,* 615 F. Supp. 828 (N.D. Ill. 1985), Malley-Duff's allegations

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III.

The district court dismissed the RICO claims predicated on the alleged obstructions of justice in *Malley-Duff I* because, it held, interference with a lawsuit did not constitute an injury to "business or property" within the meaning of RICO. We believe, especially in light of the Supreme Court's intervening decision in *Sedima,* that this constituted reversible error.

The district court relied on the analysis of Judge Garrity in *Van Schaick v. Church of Scientology,* 535 F. Supp. 1125 (D. Mass. 1982), wherein he concluded that "persons injured in their business or property" should be read as meaning "business persons engaged in conventional commercial activity who allegedly suffered commercial injury" and that civil RICO should be "confine[d] . . . to business loss from racketeering injuries." 535 F. Supp. at 1136-37. Interference with a lawsuit, the district court here said, was not such an injury. It went on to state that there were sound policy reasons for construing RICO as not permitting this claim: "There are other remedies available to plaintiff for such wrongs; *e.g.,* discovery sanctions, evidentiary inferences in the original suit, contempt citations, and referral to the proper authorities for criminal investigation. The lure of lucrative treble damages under RICO is too great to permit recovery for such conduct as an injury to the person's 'property'. An enormous multiplicity of suits could result from holding otherwise." App. at 20a.

Though the district court's concerns are substantial ones, we do not believe its analysis can be squared with RICO as it is written or as construed in *Sedima.* If RICO's reference to injury to "business *or* property" is to be given

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(Continued)
of similar conduct in Cleveland, Chicago and other cities seems to us a sufficient pleading of a "pattern" of racketeering injury.

meaning, RICO standing cannot be limited to "business" injuries only. We would certainly think, for example, that an individual harmed in his or her personal property by loansharking activities should have a civil remedy under RICO. A cause of action, of course, if a form of "property," and when it arises out of the termination of a business, we think it is not unfair to characterize conduct tending to impair it as "business injury." The unwritten "racketeering injury" requirement—analogous to the requirement of competitive injury for antitrust standing—was specifically addressed, and rejected, by the Supreme Court in *Sedima*:

> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. 741 F.2d, at 487. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" *Ibid.* Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. . . . The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago,* [747 F.2d 384, 398 (7th Cir. 1984)].
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> It is true that private civil actions under the statute are being brought almost solely against such

> defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.
>
> We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. See generally [*Task Force Report*] at 55-69. Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its diagnosis or its remedy. The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern." We do not believe that the amorphous standing requirement imposed by the Second Circuit effectively responds to these problems, or that it is a form of statutory amendment appropriately undertaken by the courts.

105 S. Ct. at 3287 (footnote omitted).

Nor do we agree with the district court that because litigants have other potential remedies for obstructive conduct such as that alleged here, there can be no remedy under RICO. We must assume that by including obstruction of justice among the RICO predicate acts, Congress envisioned the statute being used, where all other requirements are met, to supplement remedies already available for such conduct.[21] Certainly, the possibility of a criminal

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[21]Defendants argue that Malley-Duff should be denied a RICO remedy becuase it opted not to pursue a motion for sanctions within the

(Continued on next page)

prosecution cannot be sufficient reason for denying a civil RICO remedy—such a rule would eviscerate civil RICO entirety, since all predicate acts are, by definition, crimes. *See* footnote 1 *supra*. We hold that Malley-Duff's allegations of "great expenses, delays and inconvenience . . . in its prosecution of the First Lawsuit" were a sufficient pleading of injury to business or property to give Malley-Duff RICO standing. *See also Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496 (9th Cir. 1985).

IV.

Count V of Malley-Duff's complaint, based on 42 U.S.C. § 1985(2), *see* footnote 2 *supra*, alleged intimidation of a trial judge, intimidation of plaintiff's counsel, intimidation of witnesses, destruction of evidence, and subornation of perjury, all in the context of the pretrial stages of *Malley-Duff I*. Rely on this court's decisions in *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976), where we held that only acts *directly* affecting parties, witnesses or jurors—and not other acts that may merely influence the proceedings—are cognizable under this statute, the district court summarily dismissed all but the witness intimidation allegations. Malley-Duff does not seem to seriously challenge this holding, and we affirm it.

The district court went on, however, to dismiss the remaining § 1985(2) allegations on the ground that the complaint did not allege that any witness was actually deterred from testifying "in court," but rather complained of delays, expenses, inconvenience, and the suppression of evidence during the pretrial phase. We think this is a

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(Continued)
context of *Malley-Duff I*. This seems to us a question of causation of damages, rather than a question of the type of conduct remediable under RICO. The district court may address the causation issue on remand.

crabbed and unwarranted reading of the statute. the language "in any court" is not as plain as the district court seemed to surmise and cannot be read so literally—a case may be described as "in" a certain court, even though no actual "courtroom" proceedings take place. Similarly, we think that a person asked to provide discovery in such a case, regardless of where or in what form, is for these purposes a witness "in" the court. Indeed, the statute distinguishes between being deterred from "attending such court" and from "testifying to any matter pending therein." As a policy matter, we think the statute's less than pellucid language should be read with a view to the fact that pretrial proceedings in 1870 did not have the importance they have today. Because cases can be won or lost, or their value substantially diminished, as a result of intimidation that affects witnesses' willingness or ability to provide discovery, we hold that the statute applies.[22]

The case the district court relied on in holding that pretrial intimidation does not give rise to a cause of action under § 1985(2) is not on point. *Kimble v. D.J. McDuffy, Inc.* 648 F.2d 340 (5th Cir.)(in banc), *cert. denied*, 454 U.S. 1110 (1981) involved a claim that employees were terminated for having filed worker's compensation claims. The statute refers to retaliation for giving testimony, not for the filing of complaints. Thus, the Fifth Circuit could not square the case before it with the language of the statute.

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[22]*See also* Chahal v. Paine Webber, 725 F.2d 20, 24 (2d Cir. 1984):

> The statute does not define the term "witness." However, Congress' purpose, which was to protect citizens in the exercise of their constitutional and statutory rights to enforce laws enacted for their benefit, is achieved by interpreting the word "witness" liberally to mean not only a person who has taken the stand or is under subpoena but also one whom a party intends to call as a witness. Deterrence or intimidation of a potential witness can be just as harmful to a litigant as threats to a witness who has begun to testify.

A case closer to this one is *Chahal v. Paine Webber*, 725 F.2d 20 (2d Cir. 1984), where the § 1985(2) claim alleged that the defendants had conspired to intimidate an expert witness into withdrawing from the case. The underlying case had not gone to trial when the § 1985(2) claim was brought, but nonetheless the court of appeals found a claim stated. Contrary to the district court here, which held that the only cognizable injuries are the actual failure of a witness to appear at trial, resulting in diminished recovery or loss of a lawsuit, the Second Circuit found it sufficient to allege as injury "the $1,410 paid to [the expert] for his services and cost of preparing him to assist in [the underlying] action. In any event one need not suffer monetary damage to prevail in an action for denial of civil rights." 725 F.2d at 24.

We agree with the Second Circuit that "[t]he essential allegations of 1985(2) claim of witness intimidation are (1) a conspiracy between two or more persons (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiffs." 725 F.2d at 23. *See also Miller v. Glen & Helen Aircraft*, 777 F.2d at 498. Under this standard, Malley-Duff's allegations are sufficient to state a § 1985(2) claim of witness intimidation.[23]

V.

Having dismissed all of Malley-Duff's federal claims, the district court exercised its discretion and dismissed its pendent state claim for civil conspiracy as well. Because we

[23]The district court stated that even if its interpretation of § 1985(2) was erroneous, as we have now held, "plaintiff's action *may* yet be barred by the statute of limitations." (Emphasis added.) This does not quite rise to the level of an alternative holding, and we do not find sufficient material in this record to make this determination ourselves. Nor has the issue been argued or briefed. We will therefore leave this issue open on remand.

reverse the dismissals of the federal claims, we will also reinstate the pendent claim for further consideration, intimating no view as to its sufficiency, timeliness, or merits.

CONCLUSION

For the reasons stated in the foregoing opinion, we will reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

SLOVITER, *Circuit Judge*, Concurring in the judgment.

I join in Parts I, III, and IV of the majority opinion. As set forth in my concurring opinion in *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, Nos. 85-3380, 85-3366, filed today, I disagree with the majority's approach in looking to state statutes of limitations to find one applicable to civil RICO claims. Instead, I would apply the four year statute set forth in section 4 of the Clayton Act, 15 U.S.C. § 15b. The argument that a federal statute of limitations should govern was not presented by plaintiffs in this action. Nonetheless, my comments in *A.J. Cunningham* are equally applicable to the issue presented here.

Because the plaintiffs in this case filed their complaint within four years of the date that their claim accrued, I agree with the majority that their complaint was filed timely and I therefore concur in the majority's reversal of the judgment of the district court and remand for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3228

MALLEY-DUFF & ASSOCIATES, INC.
Appellant

v.

CROWN LIFE INSURANCE CO., a Corp.
AGENCY HOLDING CORP, an Illinois Corp.
AGENCY HOLDING CORP, an Ohio Corp.
CLARKE BURTON LLOYD, individual
KERRY PATRICK CRAIG, individual
DIANE PARIANO, individual
EHRMAN RATINI OGLEVEE & CRAIG INC.,
a Pennsylvania Corporation
ROBERT OGLEVEE, individual

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges.*

The petition for rehearing filed by appellees, Crown Life Insurance Company and Clarke Burton Lloyd, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

. . /s/ A. LEON HIGGINBOTHAM, JR. . . .
A. Leon Higginbotham, Jr.
Circuit Judge

Dated: July 1, 1986

B-3

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3228

MALLEY-DUFF & ASSOCIATES, INC.
Appellant

v.

CROWN LIFE INSURANCE CO., a Corp.
AGENCY HOLDING CORP, an Illinois Corp.
AGENCY HOLDING CORP, an Ohio Corp.
CLARKE BURTON LLOYD, individual
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DIANE PARIANO, individual
EHRMAN RATINI OGLEVEE & CRAIG INC.,
a Pennsylvania Corporation
ROBERT OGLEVEE, individual

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges.*

The petition for rehearing filed by appellees, Agency Holding Corp. Illinois, Agency Holding Corp. Ohio, Kerry Patrick Craig, Diane Pariano, Ehrman Ratini Oglevee & Craig, Inc., and Robert Oglevee, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ A. LEON HIGGINBOTHAM, JR.
A. Leon Higginbotham, Jr.
Circuit Judge

Dated: July 1, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF
ASSOCIATES, INC.,

Plaintiff,

vs.

CROWN LIFE INSURANCE CO., a corporation, AGENCY HOLDING CORP., an Illinois corporation, AGENCY HOLDING CORP., an Ohio corporation, CLARK BURTON LLOYD, an individual, KERRY PATRICK CRAIG, an individual, DIANE PARIANO, an individual, EHRMAN RATINI OGLEVEE & CRAIG, INC., a Pennsylvania corporation, and ROBERT OGLEVEE, an individual,

Defendants.

Civil Action
No. 81-439

MEMORANDUM OPINION

BLOCH, District J.

Plaintiff brings this suit to recover damages allegedly incurred as the result of (1) defendants' violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et. seq.* (hereinafter referred to as "RICO"), (2) defendants' violation of plaintiff's civil rights under 42 U.S.C. § 1985(2), and (3) a civil conspiracy by the defendants to interfere with plaintiff's rights. Defendants

have moved for summary judgment, which this Court will grant.

I. RICO Counts

In Counts 1 through 4, the plaintiff asserts violations of RICO, which provides civil remedies in the form of treble damages for "[a]ny person injured in his business or property by reason of a violation." 18 U.S.C. § 1964(c). The word "person" includes the plaintiff corporation. 18 U.S.C. § 1961.

Plaintiff contends that defendants Lloyd, Craig and Crown Life Insurance Company (hereinafter referred to as "Crown") associated themselves as an enterprise for the purpose of taking over various Crown insurance agencies that had lucrative territories in the United States. (Complaint, ¶18). Plaintiff alleges that defendants used mail and wire communications and travel in interstate and foreign commerce to accomplish their goal. The takeover scheme consisted of the setting in 1977 of a sham production quota too high to be met and the seizing of the agency by defendants in 1978 when it failed to meet the quota. These allegations also form the basis of a complaint filed on April 5, 1978, at Civil Action No. 78-373 (hereinafter referred to as the "1978 lawsuit").

Plaintiff further alleges that the defendants obstructed justice by intentionally interfering with plaintiff's prosecution of the 1978 lawsuit. Specifically, plaintiff charges the defendants with (1) destruction of evidence, (2) circulation of false and defamatory information to the media about the judge who was originally assigned to the 1978 suit, (3) subornation of perjury, (4) tampering with a witness, (5) perjury, and (6) obstruction of a U.S. Marshal in the performance of his duties.

The injuries alleged by plaintiff fall into two categories: (1) business injuries which are alleged in the 1978 lawsuit, and (2) injuries caused by defendants' obstruction of justice. Defendants move for summary judgment on the ground that any claim for injuries to the business is beyond the statute of limitations, and any claim for injuries caused by the obstruction of justice falls outside the scope of RICO or, alternatively, is barred by the statute of limitations.

A. Business Injuries: Statute of Limitations

The parties agree that suits under RICO are governed by the limitations period of the most analogous cause of action under Pennsylvania law. (Defendants' brief, p. 9; plaintiff's brief, p. 86). Plaintiff argues, and this Court agrees, that the RICO claims for business injuries set forth in Counts 1 through 4 are most analogous to a common law fraud action in Pennsylvania. (Plaintiff's brief, p. 90). However, this Court disagrees with plaintiff's conclusion that the applicable statute of limitations for fraud actions is six years.

The plaintiff cites *Sharp v. Coopers & Lybrand,* 649 F.2d 175, 191-192 (3d Cir. 1981), *cert. denied,* 455 U.S. 938 (1982), for the proposition that fraud "falls within the catch-all provision of Pennsylvania's six-year statute of limitations." (Plaintiff's brief, p. 90). Clearly, that is *not* the holding in the *Sharp* case. The plaintiff filed suit on May 4, 1975, in the *Sharp* case. The applicable statute of limitations was six years at the time the suit was commenced in *Sharp.* Pa.Stat.Ann. Tit. 12, § 31 (Purdon 1953). This statute has since been repealed and replaced by 42 Pa.C.S.A. §§ 5521-5536 (1978). In holding that the six-year statute of limitations for common law fraud applied in *Sharp,* the

Court cited its previous holding in *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980). The Court noted in *Biggans* that, since June 27, 1978, the date on which the Judicial Code establishing a new limitations scheme became effective, it has been unclear whether the two-year period under § 5524(3) or the six-year catch-all provision under § 5527(6) applies to common law fraud actions. *Biggans*, 638 F.2d at 607 n. 2. The Court did not resolve the issue in *Biggans* because the plaintiff had filed suit prior to the effective date of the Judicial Code. Plaintiff filed suit in this action on March 20, 1981; the Judicial Code clearly applies to plaintiff's action.

Two courts have addressed the question of which limitation period applies. In *Bickell v. Stein*, 291 Pa. Super. 145, 435 A.2d 610 (1981), the Pennsylvania Superior Court upheld a lower court's dismissal of an action alleging fraud and interference with contractual relations on the ground that the action "was not commenced within the two-year period provided by the *applicable* statute, 42 Pa.C.S.A. § 5524(3) and (4)." *Id.* at 149, 435 A.2d at 612[1](emphasis added). In *Fickinger v. C. I. Planning Corp.*, 556 F. Supp. 434 (E.D. Pa. 1982), Judge Shapiro reviewed the legislative policy behind revision of the statutes of limitation in Pennsylvania and concluded that the two-year period set forth in 42 Pa.C.S.A. § 5524(3) controls. This Court agrees that the two-year period is applicable to common law fraud actions.

Although the start of the statutory limitation may be delayed by plaintiff's ignorance of the injury and its operative cause, *Bickel*, 291 Pa. Super. at 149-150; 435 A.2d at

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[1] 42 Pa.C.S.A. § 5524(3) provides that "[a] action for taking, detaining or injuring personal property, including actions for specific recovery thereof" must be commenced within two years.

612, plaintiff clearly cannot plead such ignorance as to its business injuries. As stated previously, the plaintiff pleaded fraudulent termination of the agency by use of a sham production quota in a case filed in 1978. Thus, the claim for injury to the business through termination and loss of vested renewal premiums is clearly barred by the statute of limitations.

B. Injuries Caused by Interference with Lawsuit: Scope of RICO

With respect to the claim for injuries caused by obstruction of justice through intentional interference with plaintiff's prosecution of the lawsuit, defendants argue that such injuries do not fall within the scope of RICO. Plaintiff seeks recovery under 18 U.S.C. § 1964(c), which provides as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Counts 1 through 4 incorporate allegations that the defendants violated subsections (d), (c), (b), and (a) of § 1962, respectively.

The issue is whether interference with plaintiff's 1978 lawsuit is an injury to the plaintiff's "business or property" within the meaning of RICO. This Court agrees with the analysis of District Judge Garrity in *Van Schaick v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125, 1136-1137 (D. Mass. 1982):

> [Section 1964(c)] extends a treble damage remedy to any person injured in "business or property" by a

violation of § 1962. Little legislative history exists on the clause. But courts which have recently considered § 1964(c) have interpreted it narrowly . . . They have consistently concluded that § 1964(c) must be interpreted with careful attention to the provision's purpose and have avoided a slavish literalism that would escort into federal court through RICO what traditionally have been civil actions pursued in state courts . . . Just as in the antitrust context the Supreme Court has held that the Clayton Act's treble damage provisions are available to remedy only "injury of the type the antitrust laws were intended to prevent," . . . so, too, § 1964(c) addresses only a specific sort of injury arising out of racketeering . . . Indeed, it is telling that whereas RICO's other criminal and civil penalties apply generally to violations of § 1962, the remedy which § 1964(c) prescribes extends only to persons who suffer a specific injury, viz., to their business or property.

* * *

The cases in which courts held that plaintiffs have, or but for some other defect could have, stated a claim under § 1964(c) have involved business persons engaged in conventional commercial activity who allegedly suffered commercial injury.

* * *

To be sure, RICO uses the disjunctive in referring to "business or property." Yet we believe that phrase must be read with the statute's primary purpose—to protect legitimate businesses from infiltration by racketeers—in mind . . . [W]e believe courts should confine § 1964(c) to business loss from racketeering injuries.

(Citations omitted). *See also Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449, 457 (7th Cir. 1982).

The injury suffered by plaintiff as the result of interference by the defendants with its 1978 lawsuit is not a business injury within the meaning of RICO. Futhermore, there are sound policy reasons for construing the statute as not permitting plaintiff to file a separate suit under RICO for injuries which allegedly resulted from defendants' obstruction of justice in its 1978 lawsuit. For the same reasons that no cause of action is available to a party who alleges that perjured testimony in a prior case caused him injury, no separate civil cause of action under RICO should be permitted for opprobrious conduct during the litigation of a single case. There are other remedies available to plaintiff for such wrongs; e.g., discovery sanctions, evidentiary inferences in the original suit, contempt citations, and referral to the proper authorities for criminal investigation. The lure of lucrative treble damages under RICO is too great to permit recovery for such conduct as an injury to the person's "property." An enormous multiplicity of suits could result from holding otherwise.

II. Section 1985(2) Claim

In Count 5, plaintiff alleges that defendants Lloyd, Craig, Crown, Pariano, Agency Holding Corporation of Illinois and Agency Holding Corporation of Ohio "formed a conspiracy to obstruct justice and to violate plaintiff's civil rights in connection with the [1978 lawsuit]." (Complaint, ¶34). Plaintiff alleges the following acts were committed by the defendants in furtherance of the conspiracy: (1) the hiring of a private investigator to follow the judge who was initially assigned to this case in an effort to find a basis for seeking his recusal; (2) the hiring of a private

investigator to follow plaintiff's counsel "to intimidate plaintiff's counsel with respect to his representation of plaintiff in the [1978 lawsuit]"; (3) threats and intimidation of witnesses and an attempt to prevent them from testifying; (4) destruction of relevant documents in the 1978 lawsuit, and (5) subornation of perjury. In paragraph 39 of the complaint, plaintiff alleges that such acts "constitute a conspiracy to deter, by intimidation and threat, Plaintiff and witnesses in the [1978 lawsuit] from prosecuting that action and from testifying therein in violation of 42 U.S.C. § 1985." Defendants move for dismissal on several grounds: (1) the plaintiff's failure to allege class-based animus; (2) plaintiff's failure to allege a cause of action under § 1985(2); (3) the lack of cognizable injury under § 1985; and (4) the statute of limitations.

Although plaintiff does not specifically state whether it is proceeding under the first or second clause of § 1985(2), the language of paragraph 39 closely tracks the first clause. Furthermore, no cause of action would lie under the second clause of § 1985(2) because the Supreme Court has clearly stated that the second clause "applies to conspiracies to obstruct the course of justice in state courts." *Kush v. Rutledge*, ____ U.S. ____, 103 S. Ct. ____, 75 L.Ed.2d 413, 419 (1983). Also, the Court implied that a cause of action under the second clause, unlike a cause of action under the first clause, would require a showing of class-based, invidiously discriminatory animus. *Id.* Since plaintiff did not allege interference with a state court proceeding nor class-based discriminatory animus, the Court concludes that no cause of action has been alleged under the second clause of § 1985(2). *See Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976).

The first clause of § 1985(2) provides as follows:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror . . .

In *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976), the Third Circuit upheld the dismissal of a complaint for failure to state a cause of action under § 1985(2) brought by two persons convicted of transporting stolen United States treasury bills. The plaintiffs had alleged that the prosecuting attorney conspired with a co-defendant who pled guilty "to secure the convictions of plaintiffs with the knowing use of false and perjured testimony." *Id.* at 832. The Third Circuit reasoned that, although such an allegation could be construed as stating a cause of action under the first clause of § 1985(2) which prohibits "conspir[ing] to . . . influence the verdict . . . or indictment of [the] grand or petit juror[s]," such a construction would be "impermissibly generous." *Id.* at 840. Instead, the Third Circuit concluded that the first clause of § 1985(2) "concern[s] itself with conspiratorial conduct that *directly* affects or seeks to affect parties, witnesses, or grand or petit jurors."

Using this analysis as a guide, the Court will now scrutinize plaintiff's allegations in Count 5. Four of plaintiff's allegations clearly fall outside the scope of § 1985(2):

intimidation of the presiding Judge, intimidation of plaintiff's counsel, destruction of relevant evidence, and subornation of perjury. The allegation that plaintiff's witnesses were intimidated, however, requires closer examination. Defendants raise two specific arguments with respect to these allegations: (1) only the person deterred from attending or testifying in court, or injured as a result of attending or testifying in court, may bring an action; and (2) alternatively, § 1985(2) does not apply to prosecution of an action, but rather to actual attendance or testimony in court. Plaintiff has not alleged injury on account of the failure of a witness to appear in court or the presentation of false testimony in court as a result of defendants' actions.

Defendants' first argument, that only the person deterred has standing, has been addressed by two district courts. In *Burch v. Snider,* 461 F. Supp. 598, 600 (D. Md. 1978), Chief Judge Northrop held that the language of § 1985(2) "creates a cause of action for 'parties' only insofar as they are themselves deterred from or injured on account of testifying or attending federal court. The plain words of the statute do not give parties a right to sue based on intimidation of their witnesses." In *Kelly v. Foreman,* 384 F. Supp. 1352, 1353 (S.D. Texas 1964), District Judge Singleton focused instead upon the remedial language of the statute. Section 1985(3) provides as follows:

> In any case of conspiracy set forth in [§ 1985], if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so

> injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivaiton, against any one or more of the conspirators.

Judge Singleton held that the statute clearly creates a cause of action for any person injured in the course of the alleged conspiracy. This interpretation better serves the effectuation of § 1985's purposes. In almost every case, it will be the *party* who suffers injury as a result of the intimidation of witnesses. What damages can the *witness* who was deterred from testifying claim? Thus, this Court concludes that a party may claim injury based on the intimidation of his witnesses.

Defendants' second argument, that § 1985 does not apply to prosecution of an action, was addressed by the Fifth Circuit Court of Appeals *en banc* in *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (1981). The Fifth Circuit upheld a summary judgment in favor of an employer where plaintiffs claimed that they were fired as a result of filing workmen's compensation claims. In reaching its decision, the Fifth Circuit made the following comments regarding § 1985(2):

> Passage of the Ku Klux Klan Act was "motivated by a desire to prevent and punish acts of terror or intimidation that threatened the attempt to create a political environment hospitable to equality . . . " In light of the acts of violence that threaten the sanctity of federal courts, Congress meant Section 1985(2) to protect a party based on his physical presence while attending or testifying in court. In this case, no allegations were made that plaintiffs were injured because they attended or testified in federal court . . . [Section 1985] was intended to protect against direct violations of a party or witness's right to attend or testify in federal

> court. This clear congressional purpose is best served by construing the statutory language in its ordinary meaning so that only direct interference with a federal court if prohibited.

Id. at 348 (citations omitted); *cf. Keating v. Carey,* 706 F.2d 377, 386 n. 13 (2nd Cir. 1983).

In order for plaintiff to establish a cause of action under § 1985(2), plaintiff must show that an act in furtherance of the object of the conspiracy caused injury to the plaintiff through direct interference with a federal court. Thus, the plaintiff must allege injury occasioned by (1) a conspiracy to deter plaintiff from attending or testifying truthfully, or (2) deterrence of one of plaintiff's witnesses which resulted in the witness's failure to attend court or to testify in court truthfully, with plaintiff's consequent loss of a court action or diminishment of recovery, or (3) injury to the plaintiff on account of having attended court or having testified in the 1978 lawsuit. Plaintiff claims as its injuries expenses and delays in the pretrial stages of its 1978 lawsuit and the suppression of relevant and material evidence during the discovery phase of that action.[2]

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[2] Since the filing of this complaint, plaintiff has tried and won its 1978 lawsuit, though an appeal is pending. Plaintiff has not sought to amend its complaint to allege that any witness failed to appear or to testify truthfully in the trial of that suit as a result of defendants' actions, nor has the plaintiff submitted any affidavit, claiming such an injury, subsequent to the trial of the 1978 lawsuit. The fact that plaintiff won its 1978 lawsuit despite defendants' obstructions of justice (assumed to be true for purposes of this motion) reaffirms the need to limit § 1985(2) to direct interferences with federal court. Perhaps plaintiff's witnesses were *not* deterred from appearing *in court* or testfying truthfully *in court:* that is the only injury § 1985(2) is intended to remedy. Furthermore, it does not make sense to allow recovery for pretrial obstructions of justice in a case which plaintiff may eventually win, in part, through effective use of inferences to be drawn from those same obstructions of justice.

(Complaint, ¶40). Thus, plaintiff has failed to allege a cognizable injury under § 1985(2).[3]

III. Civil Conspiracy

In Count 6, plaintiff alleges a civil conspiracy at common law. With the dismissal of Counts 1 through 5, there remains no basis for the exercise of federal jurisdiction. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726 (1966).

An appropriate Order will be issued.

Date: March 23, 1984 .../s/ ALAN N. BLOCH...

cc: Counsel of record.

---

[3]Obviously, by this reasoning, plaintiff's cause of action for intimidation of anyone other than plaintiff cannot arise prior to trial of the action. If the Court has erred and plaintiff does indeed have a cause of action for expenses and delays occasioned by defendants' deterrence of plaintiff's witnesses at the pretrial stage, then the plaintiff's action may yet be barred by the statute of limitations.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF
ASSOCIATES, INC.,

Plaintiff,

vs.

CROWN LIFE INSURANCE CO., a corporation, AGENCY HOLDING CORP., an Illinois corporation, AGENCY HOLDING CORP., an Ohio corporation, CLARKE BURTON LLOYD, an individual, KERRY PATRICK CRAIG, an individual, DIANE PARIANO, an individual, EHRMAN RATINI OGLEVEE & CRAIG, INC., a Pennsylvania corporation, and ROBERT OGLEVEE, an individual,

Defendants.

Civil Action
No. 81-439

JUDGMENT ORDER

AND NOW, this 23rd day of March, 1984, upon consideration of the Motion for Summary Judgment filed by all Defendants on July 29, 1982,

IT IS HEREBY ORDERED that said Motion is GRANTED and that judgment be, hereby is, entered in favor of Defendants and against Plaintiff.

/s/ ALAN N. BLOCH
United States District Judge

cc: H. Woodruff Turner and
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D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF &
ASSOCIATES, INC.
a corporation,
Plaintiff,
vs.

CROWN LIFE
INSURANCE COMPANY,
a corporation, et al.,
Defendants.

Civil Action
No. 81-439

NOTICE
and
MOTION FOR SUMMARY JUDGMENT

Please take Notice that the following Motion for Summary Judgment will be filed with the Clerk of Court on July 29, 1982.

THORP, REED & ARMSTRONG

By: ..../s/ JOHN H. BINGLER, JR.....
John H. Bingler, Jr.

By: ...../s/ GLENN E. BOST, II.....
Glenn E. Bost, II

Attorneys for Defendants,
Agency Holding Corporation, an
Illinois Corporation, Agency
Holding Corporation, an Ohio
Corporation, Kerry Patrick
Craig, Diane Pariano, Ehrman
Ratini Oglevee & Craig, Inc.,
and Robert Oglevee

MOTION FOR SUMMARY JUDGMENT

Agency Holding Corporation (Illinois), Agency Holding Corporation (Ohio), Ehrman Ratini Oglevee & Craig, Kerry Patrick Craig, Robert Oglevee and Diane Pariano (hereinafter the "Agency defendants"), by their attorneys move the Court for summary judgment. This motion applies only to plaintiff's 1981 Complaint. The Agency defendants adopt by reference the Motion for Summary Judgment filed by defendants Crown Life Insurance Company (hereinafter "Crown") and Clarke Burton Lloyd applicable to Plaintiff's 1978 Complaint.

Preliminary Statement

Background

On or about January 11, 1978, Crown notified plaintiff that its General Agency Agreement would be terminated, effective in one month. (Craig Affidavit attached hereto para. 7 and Exhibit B thereto.) On February 10, 1978, plaintiff sued in state court for preliminary and permanent injunctions against the termination. When plaintiff's request for a preliminary injunction was denied plaintiff abandoned its state court action and in April 1978, sued in this Court.

In this 1978 suit plaintiff's Complaint alleged antitrust violations, tortious interference, breach of contract, etc., and sought an injunction against the termination and damages for injuries resulting from the termination. Defendants' Answers alleged that the termination was lawful and pursuant to the General Agency Agreement and was prompted by plaintiff's inadequate performance and failure to meet a reasonable production standard for 1977 (Answer of defendants Crown & Lloyd — Third Defense),

which was lower than production achieved by plaintiff in a number of years prior to 1977 (Craig Affidavit para. 3; February 1978 Common Pleas Hearing transcript attached hereto at p. 125 and Exhibit A thereto). Plaintiff's Complaint had alleged that the production standard was unrealistic and unreachable.

Almost three years later, in March, 1981, plaintiff again sued in this Court, alleging RICO and Civil Rights claims and a pendent common law conspiracy claim.

Plaintiff's 1981 Complaint attempts to support its RICO claim by alleging, for the first time, that Crown's 1977 production standard was fraudulent and therefore constituted mail and wire frauds (RICO predicate offenses). It also alleges that plaintiff was defrauded of vested renewal commissions to which it was entitled. There is no evidence to support the allegation that plaintiff lost any vested renewal commissions (Craig Affidavit para. 8).

Plaintiff's 1981 Complaint attempts to support both its RICO and Civil Rights claims by alleging that during the discovery phase of the 1978 suit defendants engaged in various obstructions of justice (RICO and Civil Rights Act violations). The 1981 Complaint alleges that these obstructions, which occurred well after the termination, injured plaintiff by causing it "great expenses, delays and inconvenience [in its 1978 case and by denying plaintiff] Relevant and material evidence [in its 1978 case]."

In 1979, plaintiff had sought relief from the alleged obstructions of justice by way of a Motion for Sanctions filed in the 1978 suit. This Motion was voluntarily abandoned by plaintiff after the 1981 suit was filed. A four day

hearing on plaintiff's 1979 Motion for Sanctions was interrupted in June of 1979, when the then-presiding judge referred plaintiff's allegations to the U.S. Attorney for investigation. In 1981, the U.S. Attorney reported to this Court that no prosecution was contemplated.

Summary of Defendants' Arguments

Plaintiff has not been injured by any RICO or Civil Rights violations. Both RICO and the Civil Rights Act give causes of action to persons injured by activities the Acts prohibit; but plaintiff has not been injured by activities prohibited by RICO or the Civil Rights Act.

This is so because the only injury actually suffered by plaintiff was not caused by an activity prohibited by RICO or the Civil Rights Act. There is simply no causal connection between any allegedly wrongful activity of defendants and the only injury actually suffered by plaintiff for which the law might provide a remedy, namely, the termination of its General Agency Agreement in February, 1978. All of the obstructions of justice alleged in the 1981 Complaint, which, if proved, might constitute RICO and Civil Rights violations, took place after the termination and therefore could not have caused it. There is no evidence to show that a conspiracy to commit the alleged obstructions of justice antedated the termination.

The 1981 Complaint attempts to overcome this causation problem by claiming that the 1977 production standard, which caused the termination, constituted mail and wire frauds (RICO predicate offenses). Plaintiff may hope to prove that the standard was unrealistically high or unreachable, but there is no evidence that any fraud was involved. There were simply no misrepresentations.

Parenthetically, even if the production standard can somehow br tortured into a mail or wire fraud, any 1981 suit seeking recovery for the termination in 1978 is barred by the state statute of limitations applicable to civil RICO actions. This bar applies with equal force to plaintiff's common law conspiracy claim.

Plaintiff's 1981 Complaint attempts to overcome the absence of a causal connection between an activity prohibited by RICO or the Civil Rights Act and legally actionable injury to plaintiff, by alleging as injuries the "great expenses, delays and inconvenience . . . imposed upon Plaintiff in its" 1978 case, and the denial of "Relevant and material evidence" in this 1978 case (hereinafter referred to as "lawsuit injuries").

These alleged "lawsuit injuries" are simply not injuries recognized as actionable by the common law or RICO or the Civil Rights Act. The law simply does not recognize a separate cause of action for "lawsuit injuries" which could be remedied by sanctions available during a pending lawsuit. If it did, parties would thereby be afforded the option of either pursuing sanctions for the "lawsuit injuries" discovered during the pendency of a lawsuit or bringing separate common law or RICO or Civil Rights suits. Failing to pursue available sanctions could distort the outcome of a pending lawsuit. Opting to refrain from pursuing available sanctions would be the actual cause of the "lawsuit injuries" since they could have been avoided or eliminated by sanctions. Furthermore, parties to lawsuits could convert any serious discovery dispute in federal or state court into a common law conspiracy, RICO or Civil Rights suit.

In addition, RICO provides remedies only for commerical or competitive injuries, not "lawsuit injuries". The

Civil Rights Act in pertinent part provides remedies only when parties or witnesses are subjected to intimidation or threats. There is no evidence of intimidation or threats in this case even though plaintiff's 1981 Complaint makes this allegation.

To recover under the Civil Rights Act a plaintiff must prove that he was personally subjected to intimidation or threats, and that defendant was motivated by a class based animus. Plaintiff's Complaint does not allege the second element, and there is no evidence to support the first.

Even if RICO provided a cause of action for "lawsuit injuries", plaintiff's claims for these injuries are barred by the one year state statute of limitations applicable to civil RICO claims. Plaintiffs cause of action arose, if at ail, in 1979 and was not sued on until 1981.

If the Court grants summary judgment against plaintiff's RiCO and Civil Rights claims, it should dismiss the common law conspiracy claim because of a lack of any basis for asserting pendent jurisdiction.

Finally, the court should grant summary judgment in favor of individual defendant Pariano because there is no evidence that she participated in or caused the termination of plaintiff's General Agency Agreement (Pariano Affidavit attached hereto).

I. Motion For Summary Judgment On Plaintiff's RICO Claims

1. Plaintiff filed its' 1981 Complaint on March 20, 1981.

2. Counts 1 through 4 of plaintiff's Complaint assert causes of action based on section 1964(c) of the RICO statute, 18 USC § 1964(c) (1970).

3. RICO section 1964(c) gives a cause of action to "Any person injured in his business or property by reason of a violation of section 1962 . . . ."

4. Plaintiff has not been injured in its business or property by any RICO violation.

5. The only injury alleged in the Complaint to have been caused by wrongful activity of the defendants, and actually suffered by plaintiff, for which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February 1978.

6. RICO does not provide a remedy or recognize as actionable injuries, the "lawsuit injuries" alleged in the Complaint—"expenses, delays and inconvenience . . . imposed . . . in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence . . . in [the pending 1978 suit]."

7. RICO provides a remedy only for commercial or competitive injury to "business or property."

8. There is no evidence that any RICO violation occurred prior to the termination or caused it.

9. The 1977 performance standard alleged in the Complaint as a mail or wire fraud was not a fraud or a RICO violation.

10. Plaintiff's failure to meet this performance standard in 1977 caused plaintiff's termination.

11. The incidents which are alleged in the Complaint to be obstructions of justice all occurred subsequent to the termination and did not cause it.

12. Counts 1 through 4 of the Complaint are barred by the state statute of limitations applicable to private RICO actions, 42 Pa. C.S.A. § 5523(2).

13. Plaintiff's RICO actions accrued, if at all, more than one year prior to the filing of its' 1981 Complaint, and are therefore barred by the applicable state statute of limitations.

14. The statute of limitations on private RICO actions runs from the last act committed as part of a pattern of racketeering activity which causes injury to a plaintiff's business or property.

15. The last act committed as part of an alleged pattern of racketeering activity which caused legally actionable injury to plaintiff's business or property was the termination of plaintiff's General Agency Agreement in February, 1978.

16. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Counts 1 through 4 of plaintiff's Complaint.

II. Plaintiff's Civil Rights Claims

17. Count 5 of plaintiff's 1981 Complaint asserts a cause of action based on section 1985 (2) of the Civil Rights Act, 42 USC § 1985 (2).

18. Section 1985 (2), in pertinent part, prohibits conspiracies

> to deter, by ... intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying ... freely, fully, and truthfully....

and gives a cause of action to anyone

injured in his person or property ... for the recovery of damages, occasioned by such injury ... against any one or more of the conspirators.

19. Count 5 asserts that defendants conspired "to deter, by intimidation and threat, plaintiff and witnesses in [the pending 1978 lawsuit] from prosecuting that action and from testifying therein ...."

20. The only injuries asserted by plaintiff in Count 5 are the same "lawsuit injuries" claimed in the RICO counts, Counts 1-4—"expenses, delays and inconvenience ... imposed ... in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence ... in [the pending 1978 suit]".

21. The Civil Rights Act does not provide a remedy or recognize as injuries the "lawsuit injuries" alleged in the Complaint.

22. The Civil Rights Act in pertinent part provides a remedy only against persons who conspire to deter any party or witness by intimidation, or threat. There is no evidence that defendants participated in such a conspiracy.

23. The Civil Rights Act in pertinent part provides a remedy only for plaintiffs who are personally subjected to intimidation or threats. There is no evidence that plaintiff was so subjected.

24. The Civil Rights Act in pertinent part provides a remedy only where defendants were motivated by a class based animus. Plaintiff's Complaint does not allege this essential element.

25. Count 5 of the Complaint is barred by the state statute of limitations applicable to Civil Rights actions, 42 Pa. C.S.A. § 5524.

26. Plaintiff's Civil Rights action accrued, if at all, more than two years prior to the filing of its' 1981 Complaint, and is therefore barred by applicable statute of limitations.

27. The statute of limitations on Civil Rights actions runs from the last act committed as part of a conspiracy which causes injury to plaintiff.

28. The last acts committed as part of an alleged conspiracy which caused legally actionable injury to plaintiff was the termination of plaintiff's General Agency Agreement in February 1978.

29. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Count 5 of plaintiff's Complaint.

III. Plaintiff's Common Law Conspiracy Claims

30. Count 6 of plaintiff's Complaint asserts a cause of action based on the common law of conspiracy with jurisdiction allegedly based on pendent jurisdiction principles.

31. Conspiracy law gives a cause of action to persons injured by common law conspiracies.

32. Plaintiff has not been injured by any common law conspiracy.

33. The only injury alleged in the Complaint to have been caused by wrongful activity of the defendants, and actually suffered by plaintiff, for which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February, 1978.

34. The common law of conspiracy does not provide a remedy or recognize as actionable injuries, the "lawsuit injuries" alleged in the Complaint—"expenses, delays and

inconvenience ... imposed ... in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence ... in [the pending 1978 suit]."

35. There is no evidence that any common law conspiracy existed prior to the termination or caused it.

36. The 1977 performance standard alleged in the Complaint as a fraud was not a fraud.

37. Plaintiff's failure to meet this performance standard in 1977 caused plaintiff's termination.

38. The obstructions of justice alleged in the Complaint all occurred subsequent to the termination and did not cause it.

39. Count 6 of the Complaint is barred by the statute of limitations applicable to common law conspiracy actions, 42 Pa. C.S.A. § 5524.

40. Plaintiff's common law conspiracy action accrued, if at all, more than two years prior to the filing of its 1981 Complaint and, therefore, is barred by the applicable statute of limitations.

41. The statute of limitations on common law conspiracy actions runs from the last act allegedly committed as part of a common law conspiracy which causes injury to plaintiff.

42. The last act committed as part of an alleged common law conspiracy which caused legally actionable injury to plaintiff was the termination of plaintiff's General Agency contract in February, 1978.

43. Because summary judgment against the federal law claims in this Complaint should be granted, no basis

exists for the continued assertion of pendent jurisdiction. Count 6 should be dismissed.

44. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Count 6 of plaintiff's Complaint.

IV. Plaintiff's Claims Against Diane Pariano

45. All six counts of plaintiff's Complaint assert claims against Diane Pariano.

46. Diane Pariano was not named as a defendant in plaintiff's 1978 suit and is named only once in plaintiff's 1981 Complaint.

47. Diane Pariano did no participate in any way in any actions which led to the termination of plaintiff's General Agency Contract. (Pariano Affidavit attached hereto).

48. As of the date of plaintiff's termination in February, 1978, Diane Pariano was a 19 or 20 year old secretary in a one-secretary office operated in Cleveland by Agency Holding Corporation (Ohio). She had held that position for approximately six months. Prior to that she attended college for two years, and was not associated with Agency Holding Corporation (Ohio) in any way. As of February, 1978 she was not associated with Agency Holding Corporation (Illinois) or Ehrman Ratini Oglevee & Craig in any way.

49. No causal link exists between any act or agreement of Diane Pariano and legally actionable injury alleged by plaintiff.

50. The only injury alleged in the Complaint to have been caused by the wrongful activity of the defendants for

which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February, 1978.

51. The law does not provide a remedy or recognize as injuries, the "lawsuit injuries" alleged in the Complaint—"expenses, delays and inconvenience ... imposed ... in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence ... in [the pending 1978 suit]."

52. There are no genuine issues of material fact and Diane Pariano is entitled to judgment as a matter of law on Counts 1 through 6 of plaintiff's Complaint.

Dated: July 29, 1982

THORP, REED & ARMSTRONG

/s/ JOHN H. BINGLER, JR.
John H. Bingler, Jr.

/s/ GLENN E. BOST, II
Glenn E. Bost, II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF &
ASSOCIATES, INC.,
a corporation,
Plaintiff,

vs.

CROWN LIFE
INSURANCE COMPANY,
a corporation, et al.,
Defendants.

Civil Action
No. 81-439

ATTACHMENTS TO
MOTION FOR SUMMARY JUDGEMENT

Affidavit of Kerry Patrick Craig ..... A

Affidavit of Robert C. Oglevee ..... B

Affidavit of Diane Pariano Craig C

Transcript before the Honorable
John D. Flaherty, Jr. J.
(Court of Common Pleas of
Allegheny County—February 15 and 16, 1978) .... D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF &
ASSOCIATES, INC.,
a corporation,
Plaintiff,
vs.
CROWN LIFE
INSURANCE COMPANY,
a corporation, et al.,
Defendants.

Civil Action
No. 81-439

AFFIDAVIT IN
SUPPORT OF
DEFENDANTS'
MOTION FOR
SUMMARY
JUDGMENT

STATE OF ILLINOIS
COUNTY OF COOK } ss:

Kerry Patrick Craig, having been sworn says:

1. I am the President and sole shareholder of Agency Holding Company (Illinois), the General Agency for Crown Life Insurance Company ("Crown") for the State of Illinois. I have been President of Agency Holding Company (Illinios) since September, 1977. Prior to becoming President of Agency Holding Company (Illinois), I was an employee in the home office of Crown Life Insurance Company ("Crown") in Toronto. My immediate supervisor at Crown was Art Thomas, an Agency Vice President, responsible for certain of the General Agencies in the United States including the Pittsburgh General Agency of Malley-Duff & Associates, Inc. ("Malley-Duff"). Mr. Thomas' immediate supervisor was Clarke Lloyd, the Senior Agency Vice President of Crown for the United

States. I am familiar with the facts set forth in this affidavit, which I make in support of Defendants' Motion for Summary Judgment.

2. In 1977, I was employed as an Agency Supervisor in Crown's Agency Department. In this capacity, I had occasion to periodically visit the Malley-Duff General Agency in Pittsburgh. In early August 1977, Clarke Lloyd and I met with Thomas Malley and James Duff, the owners of Malley-Duff in Pittsburgh in early August, 1977 concerning the inadequate sales production performance of Malley-Duff and the imposition on Malley-Duff of a sales production standard for 1977. I also became familiar with the reasons for the imposition of the standard and the manner in which it was imposed. It was discussed with Messrs. Malley and Duff at the August 1977 meeting in Pittsburgh and was officially communicated to them by letter from Clarke Lloyd dated August 19, 1977. A copy is attached as "Exhibit A". The production standard called for a sales level of $7.5 million "Ordinary Net Paid". The Malley-Duff sales production had not been satisfactory for a number of years. Messrs. Malley and Duff had been told many times about this. The imposition of a production standard was a last resort. The August 1977 meeting was prompted by the January-June sales production figures of Malley-Duff which showed that Malley-Duff's performance was continuing to be unsatisfactory.

3. The production standard imposed on Malley-Duff for the year 1977 was lower than the production achieved by Malley-Duff in the years 1970, 1971, 1972 and 1975.

4. Crown had been setting sales production standards for many years for General Agencies who were not doing an adequate job in Crown's view. This gave the General Agencies and Crown a standard of performance Crown

would find acceptable. A General Agency would be told it needed to achieve a certain amount of sales production or Crown would have to find someone else to handle the market. The standard is set at a certain percentage of the total market in the General Agency's geographic area.

5. On October 4, 1977, Clarke Lloyd again wrote to Messrs. Malley and Duff and urged them "to put forth every effort to avoid termination of [their] contract for lack of production at the beginning of 1978." This letter was prompted by a review of Malley-Duff's sales production figures for January-September, 1977 which showed that Malley-Duff wasn't doing anything in the marketplace.

6. Malley-Duff operated as General Agency of Crown under General Agency Agreements amended and entered into periodically as products or commission rates were changed. Paragraph 30 of these Agreements provided:

> This Agreement may be terminated on one month's notice by either party and such notice will be deemed to have been given when a registered letter containing the notice is mailed addressed to the party entitled to the notice at the party's last known address.

7. When Malley-Duff failed to meet the production standard set forth in the August 19, 1977 letter, Crown exercised its right under paragraph 30 and terminated Malley-Duff on one month's notice by letter dated January 11, 1978 effective February 10, 1978. A copy of this letter is attached as "Exhibit B". Malley-Duff produced in 1977 approximately $5.5 million in "Ordinary Net Paid".

8. Even after termination, Malley-Duff was entitled under its Agreement with Crown to receive vested renewal commissions on premiums paid on policies solicited by Malley-Duff prior to termination. Since termination, the

renewal commissions to which Malley-Duff is entitled have been paid to Malley-Duff. None have been transferred from Malley-Duff to any defendant.

9. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ KERRY PATRICK CRAIG
Kerry Patrick Craig

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ ARTHUR R. O'BRIEN
Notary Public

My Commission Expires:
October 28, 1984

D-19

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF &
ASSOCIATES, INC.,
Plaintiff,
vs.
CROWN LIFE
INSURANCE COMPANY,
a corporation, et al.,
Defendants.

Civil Action
No. 81-439

AFFIDAVIT IN
SUPPORT OF
DEFENDANTS'
MOTION FOR
SUMMARY
JUDGMENT

STATE OF ILLINOIS
COUNTY OF COOK } ss:

Diane Pariano Craig, having been sworn, says:

1. I am presently Mrs. Kerry Patrick Craig. Kerry and I were married on April 16, 1982. From July 13, 1977, to June 30, 1978, I was employed as a secretary in the one secretary office of Agency Holding Corporation (Ohio) in Cleveland. I was at the time 19 and 20 years old. I am familiar with the facts set forth in this affidavit, which I make in support of Defendants' Motion For Summary Judgment.

2. After I graduated from Fairview Park High School in Fairview Park, Ohio, a suburb of Cleveland, in 1975, I attended college for two years until May 1977. During this period, I was not associated with Agency Holding Corporation (Ohio) in any way.

3. In June 1977, I began looking for a job and on July 13, 1977, was hired by Edward J. Horning to work as the secretary for Agency Holding Corporation.

4. On February 13, 1978, in Pittsburgh I learned for the first time that Malley-Duff & Associates, Inc. ("Malley-Duff") had been terminated as General Agent in Pittsburgh. I had never heard of Malley-Duff prior to that date. Robert Oglevee, my boss at Agency Holding Corporation (Ohio), asked me to help Crown organize the Malley-Duff records which had been turned over to Crown in Pittsburgh at or shortly after the termination.

5. I did not participate in any way in any acts, agreements, discussions or anything else that had to do with the setting of a production standard for Malley-Duff or the decision to terminate or the termination of Malley-Duff.

6. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ DIANE PARIANO CRAIG
Diane Pariano Craig

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ ARTHUR R. O'BRIEN
Notary Public

My Commission Expires: October 25, 1984

D-21

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF &
ASSOCIATES, INC.,
Plaintiff,
vs.
CROWN LIFE
INSURANCE
COMPANY,
a corporation, et al.,
Defendants.

Civil Action
No. 81-439

AFFIDAVIT IN
SUPPORT OF
DEFENDANTS'
MOTION FOR
SUMMARY
JUDGMENT

STATE OF ILLINOIS
COUNTY OF COOK } ss:

Robert C. Oglevee, having been sworn, says:

1. I am the President and sole shareholder of R. C. Oglevee & Assoc., Inc., the General Agency for Crown Life Insurance Company ("Crown") for the Pittsburgh area. I have been President of R. C. Oglevee & Assoc., Inc. or Secretary of its predecessor Ehrman, Ratini, Oglevee & Craig, Inc. since 1978. I am familiar with the facts set forth in this affidavit, which I make in support of Defendants' Motion for Summary Judgment.

2. Even after the termination of its General Agency Agreement, Malley-Duff was entitled under its Agreement to receive vested renewal commissions on premiums paid on policies solicited through Malley-Duff prior to termination. Since termination, the renewal commissions to which Malley-Duff is entitled have been paid to Malley-Duff. None have been transferred from Malley-Duff to any defendant.

3. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ ROBERT C. OGLEVEE
Robert C. Oglevee

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ MARY CAIVANO
Notary Public

My Commission Expires:

D-23

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

MALLEY-DUFF &
ASSOCIATES, INC.,
a corporation,
Plaintiff,
vs.
CROWN LIFE
INSURANCE COMPANY,
a corporation,
JULES EHRMAN, et al.,
Defendants.

G.D. 78-3321

, Pittsburgh, Pennsylvania
February 15 and 16, 1978

BEFORE: The Honorable John P. Flaherty, Jr., J.

APPEARANCES:

For Malley-Duff & Associates, Inc.:
H. WOODRUFF TURNER, ESQUIRE
MISS JANICE H. ANDERSON
Kirkpatrick, Lockhart, Johnson & Hutchison
1500 Oliver Building
Pittsburgh, Pa. 15222

For Crown Life Insurance Company:
ALEXANDER BLACK, ESQUIRE
Buchanan, Ingersoll, Rodewald, Kyle & Buerger
57th Floor, U.S. Steel Building

For Jules Ehrman: GERALD S. LESHER, ESQUIRE
HERBERT B. SACHS, ESQUIRE
Baskin, Boreman, Wilner, Sachs, Gondelman & Craig
Tenth Floor, Frick Building

TRANSCRIPT OF OFFICIAL STENOGRAPHIC NOTES OF PROCEEDINGS

Ralph E. Shuster,
Court Reporter
331 Grant Building, Pgh., Pa. 15219
Cover page rec'd from J. Borus (Budem) on 6/8/79 by G. Bost

PLAINTIFF'S WITNESSES:

	DIRECT	CROSS	REDIRECT	RECROSS
MR. KERRY PATRICK CRAIG	5	57		
MR. JULES EHRMAN	59			
MR. CLARKE BURTON LLOYD	71	122	127, 131	129
MR. JAMES A. DUFF, JR.	134	144		

Plaintiff's Preliminary Injunction Exhibits	Identified	Received
No. 1—	12	13
No. 2—	75	107
No. 3—	83	85
No. 4—	107	
No. 5—	116	
No. 6—	144	143
Crown's Preliminary Injunction Exhibit No. A	142	132

(Author's Copy Missing)

created, that my clients have created. In other words, is he going to come in now and take over, either directly or indirectly, the business that my clients built up in Pittsburgh?

THE COURT: Is that the offer?

MR. TURNER: Essentially, Your Honor.

MR. LESHER: I would say, Your Honor, that the offer is irrelevant and immaterial.

THE COURT: It might well be. But we will hear the testimony. And the Court will then decide. I reserve any ruling on the merits of that point.

(AFTER SIDE BAR CONFERENCE)

MR. KERRY PATRICK CRAIG, called as a witness in behalf of the Plaintiff, first duly having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TURNER:

Q State your full name, please.

A Kerry Patrick Craig.

Q And what is your address?

A 1421 North Dearborn, Chicago, Illinois.

Q Of what country are you a citizen?

A Canada.

Q Where are you employed?

A Presently?

Q Yes, sir.

A I am self-employed, but I am employed by Agency Holding Corporation of Chicago.

Q In what capacity are you employed by Agency Holding Company?

A I am President of Agency Holding Corporation.

Q Are you?

A It's a corporation, by the way, not a company.

Q Agency Holding Corporation?

A Corporation.

Q Where is that company incorporated?

A Chicago, Illinois.

Q What is the nature of its business?

A It's a general agency for the Crown Life Insurance Company.

Now, are you one of the shareholders or owners of that company?

A I am.

Q In your capacity or as a nominee for someone else?

A My own capacity.

Q How long have you been so employed?

A I have been employed since I received my papers. I moved down here in September, September 2nd of this year.

Q You mean, down here last year?

A My immigration papers.

Q Your immigration papers. And when was that, sir?

A September of this year.

Q September of last year, do you mean?

A Excuse me. Yes.

Q September of 1977?

A Yes, correct.

Q And what is the—in general, tell His Honor what the business of this Agency Holding Company is.

A It's a general agent for the Crown Life Insurance Company. And that is, that we solicit insurance from independent brokers to place with the Crown Life Insurance Company.

Q And in what geographical territory does your company carry on its business.

A It is, except for a couple of counties that I am not sure of right now, the entire State of Illinois.

Q Now, are you in any way connected with a company that holds a general agency for the sale of Crown insurance in the State of Ohio?

A Yes, I am.

Q And in what capacity?

A I am a Vice President of that company, domiciled in Cleveland.

Q In Cleveland. And are you connected with that Cleveland Agency in an ownership capacity?

A Yes, I am.

Q How long have you been so affiliated?

A Approximately the same time.

Q Now, are you connected with the Crown general agency, any entity holding a Crown agency in any other city, other than Cleveland and Chicago?

A No, I am not.

Q What is your age?

A I am thirty years old.

Q Prior to being employed by this agency holding company, where were you employed?

A I was employed in the Home Office of the Crown Life Insurance Company in Toronto.

Q In what capacity?

A I was in the Agency Department. I was Agency Supervisor.

Q How long were you so employed?

A By the Crown Life Insurance Company?

Q Yes, sir.

A Almost nine years.

Q And in the same capacity during that nine years?

A No, no.

Q Was that your position when you left the employ of Crown Life Insurance Company?

A Yes.

Q Now, in your capacity as a Supervisor in the Agency Department at Crown, to whom did you report?

A Mr. Art Thomas. He is an Agency Vice President.

Q Was he in charge of agencies in the United States or—

A Part of the agencies in the United States.

Q Now, in your dealings as an employee of the Home Office, did you have any connection with an agency in the City of Pittsburgh known as the Malley-Duff & Associates, Inc.?

A I had some connection; not much.

Q Your answer is Yes?

A Yes. Some.

Q Now, did you have any dealings with that Agency in the summer of 1977; specifically, in early August?

A What do you mean by dealings?

Q Did you have any business transactions with them? Did you speak to them? Did you talk with them? Did you meet with them?

A There may have been a memo that came across my desk that they wanted something from the Advertising Department. Is that what you are talking about?

Q You don't know whether you had any dealings with them or not? Is that it?

A No. I had fifty-some agencies that I worked with. Stuff crossed my desk all the time. If you have something specific,—

Q Very well. Did you, late in July or early in August, 1977, come to the City of Pittsburgh to meet with the principals of the Malley-Duff Agency?

A Yes, I did.

Q Do you know the date of that meeting?

A Offhand, no, I don't.

Q And at that meeting, were you aware of any discussions that took place concerning a quota of production that was to be imposed upon Malley-Duff & Associates?

A Yes.

Q And prior to coming to that meeting, had you spoken with anyone else at Crown concerning the imposition of this so-called quota on Malley-Duff?

A Yes.

Q And with whom had you spoken concerning that subject?

A I think the, initially, Art Thomas; then Clarke Lloyd. See—

Q Who was Clarke Lloyd?

A Clarke Lloyd is a Senior Agency Vice President for the United States that Mr. Thomas reports to.

Q Is this Mr. Lloyd in the courtroom today?

A Yes, sir.

Q Did Mr. Lloyd, in fact, accompany you to the City of Pittsburgh to meet with Messrs. Duff and Malley?

A Yes, sir.

Q Following the meeting in Pittsburgh, did you and/or Mr. Lloyd write a letter in which certain quotas for the year, 1977, were imposed upon Malley-Duff & Associates?

A Yes. I believe the letter was sent to them.

Q Did you send it?

A I didn't write it, no.

Q But you are aware that a quota was imposed, are you not?

A Yes, I am.

Q Now, at the time,—do you know what time period that quota covered?

A The time period, I think, it was until the end of that year.

Q From what starting point?

A From the beginning of that year, I believe. I didn't write the letter. I am not much familiar with it. Being not an officer of the Department, I am not in a position to impose quotas on agencies.

Q But you participated in this decision to impose the quota?

A I was in on the discussion, yes.

Q Well, did you agree with the decision or did you oppose it?

A I agreed with it.

Q Yes, sir. Now, when did you actually—Strike that, please. As I understand it, then, sir, in August of 1977, Crown Life imposed a quota on Malley-Duff covering the period from January 1, 1977, until December 31, 1977; is that correct?

MR. BLACK: Just a minute. Your Honor, I think this is improper because this letter is a written document. Mr. Turner has it and has had, I think, for quite a while. He has attached it as Exhibit B to the Complaint. And I don't think it is fair for him to be cross-examining this witness, who didn't make the decision, about what the letter said.

THE COURT: I see the letter being produced at this time.

MR. BLACK: It's Exhibit B to the Complaint.

MR. TURNER: I will withdraw the question and ask that this be marked for identification and we can proceed from there.

MR. BLACK: Actually, Mr. Turner's questions, I think, misstated what the letter said, because—

THE COURT: The letter will speak for itself.

MR. BLACK: I think it should.

MR. TURNER: I will withdraw the question. We will mark that as Preliminary Injunction Exhibit 1, let's say, and admit it into evidence.

THE COURT: The Exhibit will be that which is attached to the complaint and that is the one to which the Court will refer, if necessary.

(Plaintiff's Preliminary Injunction Exhibit No. 1 was marked for identification.)

MR. TURNER: This has been marked Exhibit 1 for this hearing.

BY MR. TURNER (continuing):

Q Let me put this before you, Mr. Craig, and ask you if you have ever seen that document before.

A Yes, I have.

Q Isn't, in fact, that Exhibit 1 the letter to which we have been referring here and talking about, the imposition of a quota?

A Yes.

Q And it is dated August 19th, 1977? Is that the date of the letter, sir?

A Yes, it is.

Q And as a matter of fact, on Page 2, the quota that Crown imposed was a quota for the period, January 1, 1977, through December 31, 1977; and then on for future years; right?

MR. BLACK: That is objected to, Your Honor. The letter speaks for itself.

THE COURT: All right, I will sustain the objection. We don't require testimony, I believe,—

MR. BLACK: May I—

THE COURT:—relating to the letter because we have it here.

MR. TURNER: Very well.

THE COURT: And it's admitted into evidence. We can have argument from the letter at a later time.

MR. TURNER: Very well. I will withdraw the question, Your Honor. No problem.

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dispute over it—I didn't know that there was a serious question as to authenticity of this letter.

MR. BLACK: I don't know whether there is, either, Your Honor. This original document must have been in the hands of Mr. Turner's clients. I have

had no opportunity to compare it with what Mr. Turner has just given me.

THE COURT: I don't know the significance of the letter, either, yet. I just know of—well—Do you object to the admission of this letter into evidence for this proceeding? As you are aware, we are here on a preliminary injunction matter.

MR. BLACK: If I am provided with an opportunity to compare this, what has been marked as Exhibit 1, with the original, I'll not raise any question about this not being the original. But I haven't had that opportunity.

THE COURT: Well, I am certain that counsel will permit you that opportunity. Please let us move on.

MR. TURNER: Yes. Well, let me ask this witness, Your Honor, since the question has been raised.

BY MR. TURNER (continuing):

Q You saw the original letter that was sent out, did you not, to Messrs. Malley and Duff?

A I am not sure whether I did or not.

Q Your testimony is, you don't know whether that is the letter that was sent or not?

A It looks like it. It's familiar to me. I am not an expert, if that is what you are asking.

Q Did the letter that you saw say that Malley-Duff shall have an ordinary net paid level at December, 1977, of seven and a half million dollars? Is that what the letter you saw said?

A Yes, I would say Yes.

Q Sure. Now, did you appreciate, sir, when you were participating in the writing or the agreement to send out this letter, that the year to which—

A It was a very brief—

Q Would you let me finish, please.

MR. BLACK: Don't interrupt the witness. If Your Honor, please, I think the witness should be allowed to explain his answer.

THE COURT: I think there was a little confusion there. I don't believe counsel has finished the question. Maybe the witness thought he had. Why don't we start—

A I didn't participate in the authorship of the letter, if that is what you are implying.

Q No. I am asking you, sir, whether you at the time you were engaged in the consideration of this matter on behalf of Crown, were aware that the year which the quota was covering was approximately eight and a half twelfths expired; did you know that?

A Well, I know that were August falls in the year, yes.

Q Do you know of any other written document that was sent to Messrs. Malley and Duff before August that imposed a quota upon them for the year 1977?

MR. BLACK: Now, Your Honor, Mr. Turner keeps speaking in terms of a quota; but I don't see that anywhere in this letter. I think he ought to use a less inflammatory word. The letter speaks of meeting standards. I suggest we call it a standard.

THE COURT: We know what we are talking about. I believe the question, Mr. Black, was, was he aware of any standards, as you put it, which exist independently of the letter; isn't that correct?

MR. TURNER: At a prior time.

THE COURT: At a prior time, you see. And so, if he does, by his own personal knowledge, he would so answer. And if he doesn't, then, of course, he will so advise. Mr. Witness?

A No, I am not aware of any, any written—there may have been verbal. I am not—

Q All right, now, at the time this letter was sent to Malley-Duff & Associates, did you know how much business they had produced up to, at or about that middle of August, when the quota was imposed?

A I would have known. It was my job to know.

Q Do you recollect and—

A No, I don't have a recollection. As I said, I had fifty agencies.

Q Was it seven and a half million dollars?

A As I said, I don't know. You asked me.

Q Do you know whether Malley-Duff had ever, out of their Pittsburgh operation, alone, sold seven and a half million dollars?

A I think they did. They may have. Again, you are asking me; and I am saying it off the top of my head.

Q If you don't know, tell me.

A I think they may have at one point. They may have exceeded that. I am not too sure. You are asking me things I am not completely familiar with right now.

Q Subsequent to the quota, subsequent to the writing of Exhibit 1, for this hearing, were you aware of any other correspondence or communications addressed to Malley-Duff with respect to this so-called quota or goal or whatever Mr. Black prefers?

A No.

Q After you were in the City of Pittsburgh in early August of '77, preceding the writing of Exhibit No. 1, did you thereafter, up to the present day, have any conversations concern

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he and Mr. Craig are discharged.

THE COURT: If there are no further questions, then I would excuse the witness.

MR. LESHER: Is he discharged from the obligation of the subpoena?

MR. TURNER: Yes. I appreciate counsel's courtesy and I have no objection to excusing them.

THE COURT: The witness may stand down.

MR. TURNER: Mr. Lloyd.

MR. CLARKE BURTON LLOYD, called as a witness in behalf of the Plaintiff, first duly having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TURNER:

Q Will you state your full name, please.

A Clarke Burton Lloyd.

Q What is your address or residence?

A 19 Heathdale Road, Toronto, Canada.

Q What is your country of citizenship?

A Canada.

Q What is your occupation?

A I am the Senior Agency Vice President for the United States for the Crown Life Insurance Company of Toronto, Canada.

Q How long have you held that position?

A A few years, perhaps five.

Q How long have you been employed by Crown Life Insurance Company?

A Since 1947.

Q Have you ever heard of an entity, Agency Holding Company of Illinois?

A Yes, I have.

Q Do you know who the owners of that company are?

A Yes, I do.

Q Who are they?

A Kerry P. Craig.

Q Is he the sole and only owner, so far as you know?

A So far as I know, he is the sole and only owner.

Q And what is the business of that company?

A They are the general agents for the Crown Life Insurance Company for the State of Illinois.

Q How long have they been so engaged?

A Since March of 1977.

Q I believe the witness, Craig, testified yesterday that he was not capable to enter the country to start this work until September. Was it run by others in the interim?

A Yes, it was.

Q By whom?

A It was run by a lawyer in the—a Mr. Bruce M. Pennamped, who maintained the agency for the Crown Life due to the death of the general agent who had been there previously. And the company required an entity to be set up so that the family's interest could be maintained.

Q And did Crown acquire or did Agency Holding acquire the family's interest?

A No, they did not.

Q All right, this gentleman was operating the business in the capacity of running this agency rather than as a counsel to the agency?

A No, he ran it as a counsel to the agency.

Q But he actually managed the business affairs during this interim; is that right?

A Any business affairs that required to be managed, he managed, although, in fact, the accountant for the previous general agency really ran the affairs of the

agency from a record basis and a former broker, who was a friend of the family of the deceased, managed it from a sales point of view. Mr. Pennamped really managed it from a legal overview point of view, somebody who would sign the necessary legal papers that have to be maintained, et cetera.

Q All right, now, what is your role in Agency Holding, Inc., of Illinois?

A My role in Agency Holding?

Q Yes, sir.

A I don't understand the implication of the question.

Q Do you have any role as a manager of decision maker, policy maker, of that agency?

A No, not whatsoever, other than the normal role that would be maintained with every agency, which is one of looking after the Company's interests.

Q That's right. Now, did you at any time in the past have a position of authority and decision making within the structure of Agency Holding?

A No, I didn't, never did, at no time.

Q What about this Agency Holding of Ohio that we have heard about? Did you have any role in that Company?

A No, sir, none whatsoever.

Q Does Crown Life Insurance have any, as a corporation, have any interest in Agency Holding?

A No, sir. It has no interest in any agency.

Q Has Crown Life Insurance provided the financing of this Agency Holding?

A As it does with any agency, no more and no less.

Q Has it provided employees from the Home Office to go out and work on the affairs of Agency Holding?

A To the extent that the Crown Life has a training program, we have two young men working in that agency, being trained for other positions. These young men have worked in our agencies, in Hawaii, in Hartford, in Dallas—they are available to be moved around to all agencies whenever we have

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A I don't remember saying that.

Q But you remember saying what?

A I remember saying, when we had just made an arrangement where we were going to give extra compensation on old business, I was discussing it with a group of general agents. Malley came in the room and said it wasn't—then he used some short, vituperative terms, indicating that he wasn't satisfied with the arrangement in any way and that my views were inciting the group to create havoc. And I said, if he wanted to terminate, that was his choice, or something like that. I don't—I have never said that, if somebody doesn't get that S.O.B. out of the room,—I have never said that to anybody. Nor, might I add, have I ever left the room when somebody asked to get me out of the room.

Q Did you come to Pittsburgh in early August, last, to meet with Mr. Malley and Mr. Duff?

A I did.

Q Who was with you?

A Mr. Craig.

Q Did you discuss at that time the imposition of a quota?

A Yes, I did.

Q And did you inform the Malley-Duff agency as to what their quota for 1977 would be?

A Yes, I did.

Q What did you tell them?

A Seven million, five hundred thousand dollars, if notified, in individual business, individual life and individual health.

Q Did you put that in writing?

A I did, yes.

Q And for what period of time? What period of time did they have to meet that quota, sir?

A Well, they had that entire year. it was on that year's business.

Q And when did that entire year end?

A December 31st. December 10th.

Q December 10th?

A I believe so, December 10th, or 11th.

Q December 10th. Do you know what day in August you imposed this quota?

A No, I don't. Maybe about the middle of August.

Q And the period, then, would have started the prior December 11th, or 10th; is that right?

A That's correct.

Q And would run through, until—

A That's correct.

Q —December 10th, 1977? At the time you imposed that quota, were you aware of the volume of sales that had been recorded prior to mid-August when you imposed the quota?

A I had been aware of the volume of sales in that agency for a number of years. They certainly weren't satisfactory, and we had told them many times about it.

MR. TURNER: Your Honor, I would ask that the witness answer the questions.

MR. BLACK: That is an answer.

MR. TURNER: It's not an answer.

THE COURT: I'll let the testimony stand.

A The volume of sales; I don't remember specifically the volume of sales. They were terrible.

Q Well, what were they? A million?

A Maybe two and a half million.

Q All right. Now, were they two and a half million?

A I don't know.

Q Approximately what you would recall?

A I would think they would be about two and a half, three million. I don't recall. It would be very low.

Q And the quota that you imposed, then, required them, from August, from mid-August, to mid-September, mid-October, and mid-November, mid-December, in

five months, they were to sell two and a half times what they had sold in the first eight months of that year, eight, nine months of that year; is that right?

A Well, I wouldn't know—Candidly, at that time, I would only have the June figures; so the figures I am quoting would be the six-month figures.

Q Yes.

A The answer to your question is, I would expect that, and more.

Q Do you know the date upon which you first gave them a number, that is to say, the quota, itself?

A I would say in August, verbally. Maybe before that. I don't know. We have been setting levels of business for many general agents, who are in our view not doing a job for us. This gives them and us a standard of performance that we would find acceptable.

Q Did you give any other general agents quotas in August?

A Well, no. I wouldn't do it in August. You know, I could have done it in September, to one or two.

Q You did some in September to one or two?

A Sure.

Q Who?

A I think Minneapolis, we set one up in September. I think others, you know. These are achievements that—levels, that we would say to somebody, "You know, you are not doing it, and you need to do this much by the end of the year, or we are going to have to find someone else to handle the market."

Q You did it in Minneapolis in September?

A Oh, no. I didn't do it, no. I shouldn't say I did it. One of my associates. When I say I, I am saying the corporate I.

Q Did they make that quota?

A Yes, sir. The only agencies that didn't was Malley and Duff, this year. Mind you, there are other, as you, if you read the letter, you know that this is a scaled up thing over a number of years, so they will have to reach a level, depending on the market place. We do it by percentage of market.

Q What other agencies who had a quota imposed upon them in September, or August, November, October, for a year, ended December 10th, had a quota imposed that was two or three times the business that they had written at the time that the quota was imposed?

A I don't know.

Q You knew, when you imposed that quota that they weren't going to make it, didn't you?

A I did not know they weren't going to make it. As a matter of fact, they both told me there would be no difficulty in making it.

Q When did they tell you that?

A In August, at the meeting. In fact, Mr. Malley said, "I can't work with quotas. I don't like quotas. I can't work well with a quota." The implication was, if I didn't give him a quota, he would do much better than that. This agency should have been doing much more volume.

Q I haven't asked you a question, sir. Now, did you ever have any discussions with anyone whatsoever to the effect that Malley-Duff would not make that quota, at or about the time you imposed it?

A No. I don't think so. I don't know. I could have. I couldn't have. that's—

Q Well, now, this is a very important matter to my clients. Did you tell people, tell anyone at the time that they weren't going to make this quota?

A I may have.

Q Did you tell Mr. Oglevee that they weren't going to make their quota?

A I doubt it. I may have.

Q Who was it that you told?

A I would have told Art Thomas, who was an associate. I would have told other people in my office, Operations.

Q Mr. Craig?

A I might have told Mr. Craig.

Q He was there when you imposed the quota; right?

A Yes. But I didn't say that I made that statement then. Did you say at that meeting, did I make that statement?

Q No, no, no. I am saying, at or about the time of that meeting, I want to know who it was you told—

A I would have said, in context, with the attitude of those two fellows, they will never make that quota. And I think I have said that to others.

Q So then, at the time you believed they wouldn't make the quota?

A Because of the attitude they took.

Q Sure.

A That doesn't imply that they could not have made that quota. If they went out and worked.

Q I know. But you didn't think they could make the quota?

MR. BLACK: He is misstating the witness' testimony.

BY MR. TURNER (continuing):

Q You didn't think they would make the quota in time?

MR. BLACK: I am objecting to his misstating the witness' testimony.

THE COURT: Well, I am not concerned with his misstatements. I am listening to the testimony of the witness.

MR. TURNER: If so, I apologize.

THE COURT: O.K. I am looking, once again, at the time. It is now twenty-five minutes to 11:00. And there is another case that is here that you well know, that we had scheduled for today, and with witnesses from out of town, and one very seriously ill, as I understand it. How much longer do you anticipate the testimony to go in this case? We might have to recess, least to go until 12:00 Noon. Now, proceed.

BY MR. TURNER (continuing):

Q I show you what has been marked here as Exhibit No. 1, for this hearing. And I ask you if you can identify that document.

A That looks like very much, yes, it's the letter I wrote to Malley-Duff & Associates.

BY MR. BLACK:

Q Is that the original letter?

A No. It's a copy.

Q Or is that a Xerox copy?

A No. it's a Xerox.

MR. BLACK: You promised to let me see the original. I just wonder if you have had time to locate it?

MR. TURNER: I have not located it. I will endeavor to find it, Mr. Black; but my files contain only the photographic copies.

A I think that is the one, yes.

Q You can examine it, sir. It's your letter. That contains a quota on the second page of that Exhibit 1, does it not?

A Well, we referred to it as a standard that seems to be an issue, but that's the one, yes, sir.

MR. TURNER: At this time, Your Honor, I would (author's copy missing)

(Plaintiff's Preliminary Injunction Exhibit No. 4 was marked for identification.)

BY MR. TURNER (continuing):

Q I show you, sir, what has been marked as Exhibit 4 for this hearing, and ask you if you can identify that document.

A That's a letter that I wrote to Malley and Duff.

Q You signed it?

A I did.

Q And this is a photocopy, is it not?

A Yes, sir.

Q But it is, so far as you know, a true photocopy?

A I would say so, yes.

Q And what, sir, did you mean, when you say, "I strongly urge you to put forth every effort to avoid termination of your contract"? Why did you write them such a letter in October of 1977?

A To encourage them to, to get out and do some work. You didn't quote the entire sentence, Counselor. May I quote the entire sentence?

THE COURT: Yes, you have that right.

A "I strongly urge you to put forth every effort to avoid termination of your contract for the lack of production at the beginning of 1978."

Q So you wrote in Exhibit 3, imposing the quotas on August 19th?

A Right.

Q And on September 4, or October 4, you write and say, "You are not doing very well; you are going to be terminated." Is that what you were telling them?

Unless they produced an amazing amount in the last month or two?

A Yes. In essence, Counselor, in response to that letter, the response to that question, that we had been doing everything we possibly could to encourage, for a number of years, these two fellows to start working together. As you know, there was conflict between them in the agency and because of this conflict, they were not out on the street, developing business. We tried to encourage them to do that. There were points of time where Mr. Malley tried to buy out Mr. Duff, and Mr. Duff was trying to buy out Mr. Malley. This has been going on for a number of years. My point is, that the Company's affairs, the Company's production, the Company's business that they were involved in was beginning to fail and when I say the Company was paying a price for their internecine activities. And the point of this letter is, "You haven't done anything since I told you to get off the stick. And here it is in October, and you are no farther ahead than you were in July. So I strongly urge you to do everything in your power to get business."

Q O.K. Isn't it a fact that the figures you were talking about here were the September 15th figures?

A That would be correct, yes.

Q And isn't it true that the September 15th figures were figures that came out less than a month after you had imposed this quota?

A Yes. But I used figures of June, as I testified earlier.

Q But the tone of your letter, Exhibit 4, here, is based upon events that had transpired in less than one month, after you had imposed the quota.

A Well, it could well be. This—I don't understand the point.

Q Let me rephrase it. The basis of your letter of October 4th, were the September 15 production figures.

A Correct.

Q And the interval between the imposition of the quota and the September 15th production summaries was some three weeks, was it not?

A Yes.

Q Now, did you have any knowledge of the particular amount of sales that had been promulgated during that three-week period, after you had imposed the quota?

A Yes.

Q How much were they?

A Well, I don't know; but we get dailies—I get a daily report on how much business is being produced by agencies. Mr. Malley indicated in conversation that one of the agencies, one of the brokers, was going to produce eight or nine million dollars of business. That was—or thirty million dollars. I talk about a thirty million dollar case or eight or nine million dollars worth of business. And obviously, we wanted them to get that business.

Q Sure. And he had three weeks, here, before your October 4th notice, to get organized and go out and start

selling, is that right, before these September 15th figures came out?

A The September figures were terrible. And there was—obviously, if they didn't get going quickly, they were going to—they weren't going to be able—they weren't doing anything in the market place. I don't understand what significance this is. All I am doing is pointing out what the current figures are, the last possible figures after my visit and indicating to them, they are still a long way off target and telling them they had four or five months to go.

Q Had you anticipated, within a three-week period after you imposed the quota, that the skys would rain business onto this agency?

A From the impression I got from Mr. Malley, yes.

Q And it's your experience, as an experienced insurance man, that when someone is given a quota, within a space of three weeks, they are going to have a lot of new business?

A Yes, sir, it is my experience.

Q Now, after your letter of October 4th, did you communicate with the agency further, in the year, 1977, concerning this quota?

A Yes, sir.

Q In what respect?

A Well, in one instance, particular, Tom and Jim came to the Home office with this same broker that was going to give them, that they expected this business from. And, naturally, we wanted to save the agency, if we could, and the point was made, is this business

coming in? And apparently we didn't know. And Jim said to me, "Well, are you going to cancel us at the end of the year?" And I said, "Well, I won't be able to tell you until January 10th, because we won't have all the figures in until then. That will give you time to get all the business that you can possibly get in." As a matter of fact, the business, as you know, from the figures, I think that you have been supplied, it has been going downhill fairly drastically, and this year wasn't much better. Mr. Ehrman did more business on an individual basis than Malley and Duff had done on the brokerage basis. The agency just was not performing.

Q Well, how much did they perform? How many dollars did they sell for you last year?

A I have the figures here, so I will quote.

Q Well, do you know?

A Well, I know from the figures here, this year, they ended up with a net paid of about $5,518,155.

Q May I see what you are referring to, sir. And that amount, I take it, according to your figures, here, that exceeds the amount that they sold for you in 1976?

A By about $1,300,000; but it's way below 1975, '74; the same as '73; way below '72, '71, and '70, and about the same as they were producing in '69.

Q How much did Mr. Ehrman's agency sell last year?

A Slightly more than that, about $5,600,000.

Q I see. Did you terminate him?

A No, sir.

Q Did you impose a quota on him for only selling five and a half million?

A No, sir. He is a personal producer, as he carefully explained to you.

Q Yes. Did you have any other agents—how many agents do you have in the United States of America.

A About eight, 87.

Q Any of them produce less than five and a half million dollars for you last year?

A Some. Newer ones.

Q Well, out of the eighty, how many produced five million dollars or less?

A I don't know. Maybe 35. Not very many.

Q And how many of those agencies that produced less than five million dollars had another agency in the same town?

A Some did.

Q How many?

A Let's see. We did forty million; fifty million; there were two agencies in Los Angeles, both of whom exceeded this.

Q Los Angeles. Any other cities where there are two agencies?

A In Miami. Both did well in the South Florida area. Minneapolis, we have two agencies; both did well.

Q All right, now,—

A I should point out, Counselor, for the Court, that we are not talking about Pittsburgh. The territory

assigned to this agency is Western Pennsylvania, except for those counties surrounding Erie.

Q Prior to August of 1977, going way back through, what you say were years of terrible production here, in any of those prior years, did you impose a quota that had to be met by Malley-Duff?

A No, sir. We tried every other method of getting ways of helping them get business.

Q You say that you have assigned various employees of the Home Office to various offices in the United States. Did you ever assign any of your Home Office staff to Pittsburgh?

A There have been people come down to help them in the office in Pittsburgh, yes.

Q I am talking about these sales persons that you assigned to Chicago or Cleveland.

A Well, Counselor, I think I might make it clear.

Q Did you or didn't you? Then you may explain.

A We would not have them here as trainees. We would not have them trained by these people.

Q You started at some time, after December 10th, to make a decision on whether to terminate the agency; is that right?

A I think I said January 10th.

Q Well, you told us that you had daily figures. Did you gain some knowledge from those daily figures by December 10th, when the year ended, fiscal year, as to whether you were going to terminate these people?

A Counselor, I testified that, when Mr. Malley and Duff visited me in December, I told them that I hadn't made the decision yet, and I wouldn't make the decision until I got the figures in January, on January 10th.

Q Well, you knew, sir, did you not, that they had not met the quota by early December?

A No, I did not know that.

Q You never took these daily figures and added them together, I guess?

A On December 10th, we could have had a two million dollar case come in, which is not unusual, which would have saved the agency. Crown Life writes, I think last year, wrote well over 110 policies, all in excess of a million dollars. That would have helped them, a great help. As I told you, they indicated to me that there was ten million dollars in business, even in this January meeting, they had ten million dollars in business, they told the President, was just ready to fall in thirty days. That could have fallen very easily in December.

Q How did you select the number for this quota that you imposed in August of 1977?

A I have a formula for doing this, rather complicated.

Q What is the formula?

A Well, I take the market; the availability of the market, the types of brokers, the length of service of the agency, how long the agency has been there, the personnel available to them, the market situation, as far as economics are concerned, and put them together

and arrive at what I think is a reasonable amount of business.

Q Did you bring the worksheets with you for that formula?

A No. I threw them away once I had done it. I do it all the time. I can show you how to do it.

Q You don't hold it in your files anywhere?

A No.

(Plaintiff's Preliminary Injunction Exhibit No. 5 was marked for identification.)

BY MR. TURNER (continuing)

Q I show you what has been marked for this hearing as Exhibit 5 and ask you to identify that, please.

A That was a letter that was sent by Mr. O'Sullivan, indicating that, "The Company hereby gives you notice of the termination provision of" thirty days.

Q Who is Mr. O'Sullivan?

A He is Assistant Superintendent of Agency Administration.

Q Did he send that out upon your instructions?

A Well, you understand, I think, it was made clear to you that I do not have the authority to terminate an agency. That authority rests with the President.

Q And did the President instruct Mr. O'Sullivan to send out this letter?

A I believe that it was sent by Mr. Hutchison, who is my senior, and the Executive Officer in Charge of Marketing.

Q So you had nothing to do with the sending of this letter, I take it?

A Other than saying that I recommended that it be sent.

Q Were you the person who brought the matter to the attention of the President, that it should be sent?

A Oh, yes.

Q That is within your—

A I'm sorry. I brought it to the attention of Mr. Hutchison, who brought it to the attention of the President.

Q I see. But you were the one who reviewed the numbers?

A That is correct.

Q And saw that the quota had not been met?

A That is correct, yes.

Q When did you get these numbers that you could determine the quota hadn't been met?

A On January 10th.

Q I see. And the next day, you had talked to Mr. Hutchison, and Hutchison had talked to the President?

A This is not that quickly done. The whole matter had been given careful consideration by everybody over a period of, not months, but years. We had to do something and the imposing of the quotas had been discussed.

Q No, I am not asking about that, sir. I am asking you now about the decision to send this letter of termination.

A This letter was determined to be sent when they didn't make the quota which everyone knew on January 10th.

Q Thank you, sir. Now, did you receive a copy of this letter at the time it was sent?

A I don't know whether I did or not. Certainly, it wasn't marked, but I knew it had gone out. It's not usual for me to get them. They go into the file.

Q If they had met the quota, would they have been terminated?

A No, sir, they would not.

Q If they had met the quota for 1978,—

A Would they have been terminated?

Q Assuming they had met the one for '77.

A They would not.

Q How did you tell the quotas for '78, '79, '80, and '81 that were in this letter?

A Because that is the normal growth. If you can get an agency moving uphill, these are really minimal objectives for an agency to develop. There is a pattern of growth that is fairly well demonstrated and it is a matter of income to the general agents. The more they grow, the more money they make from the first dollar. In other words, it is a percentage increase, so that the general agent has an incentive to sell more insurance each year, he makes more.

Q Now, when did you first discuss with Mr. Craig the Agency Holding Company's interest in this market?

A I never discussed with Mr. Craig the Agency Holding's interest in this market.

Q Have you done so up to and including today?

A No. The Agency Holding Company, as far as I know—Which agency holding, the one in Chicago?

Q Mr. Lloyd, I show you this paper that the reporter has marked Crown Life Exhibit A.

A Right, sir.

Q You removed this from you pocket.

A Yes, Sir.

Q When Mr. Turner was questioning you.

A Yes.

Q Can you tell me what it is and who prepared it.

A This was prepared by Mr. Hutchison, who is my senior officer, to whom I report. He had it prepared from Company records, showing the net paid history of the Pittsburgh East End Agency, going back to 1962, and what took place when Mr. Duff joined him in 1967.

Q These are the net paid figures?

A It is a measurement of seeing what the production of that agency was, on a year-by-year basis.

Q Now, referring to Plaintif's Exhibit 1, this letter of yours, of August 19th.

A Yes, sir.

Q With the figures in Crown's Exhibit A.

A Yes, sir.

Q Arrived at on the same basis as the figures referred to in the antepenultimate paragraph of Exhibit 1.

A Yes.

Q There may have been some group credits in here, but they would be infinitesimal. So it's fair to compare these figures in Exhibit A with this figure in te antepenultimate paragraph in Exhibit 1?

A Yes, it is, sir.

MR. BLACK: If the Court please, I offer in evidence Crown's Exhibit A.

THE COURT: These are figures,—

MR. LLOYD: This is the history of the Agency, Your Honor.

THE COURT: Mr. Turner can look at that.

MR. LLOYD: I'm sorry, I thought he had.

MR. BLACK: He did, while he was questioning.

THE COURT: I believe, certainly, it is relevant, it was brought up on direct examination.

MR. TURNER: I just don't, can't stipulate to the authenticity of this.

THE COURT: I assume that this witness had.

MR. LLOYD: Yes.

THE TURNER: He said that it was prepared by another man, Mr. Hutchison, I believe.

MR. LLOYD: Yes, but it's prepared from Company figures. That is directly from the Company history.

BY THE COURT:

Q And to your knowledge, Mr. Witness, are those figures accurate and do they reflect the history of the agency in question?

A Yes, they do, sir.

THE COURT: It's admitted.

BY MR. BLACK (continuing):

Q Now, Mr. Lloyd, was there ever a year, as shown by Exhibit A, when Mally-Duff met the—what did you call it, a standard?

A Standard.

Q —standard that you told them you were going to hold them to in 1977?

A Yes, sir. Well, in their own agency, they met the standard in 1970 or just met it by $150,000 in '71. They went over the standard in 1972, and they were over the standard in 1975.

Q So what you told them they would have to do in 1977 was no more than, not even as much as they, in fact, had done just two years earlier; is that correct?

A Yes, sir; that is correct.

Q There is attached to the complaint in this case, Mr. Lloyd, a copy of a memorandum of agreement that is denominated Exhibit A, between Malley-Duff & Associates, Inc., and Crown Life Insurance Company. Is

that the agreement that is referred to as the one that took effect September 1, 1977?

A Yes, it is.

Q What was the reason for having a new agreement at that time?

A Well, we from time to time bring out new products, and we increased commissions and increase bonuses and things like that. We had just done that, and this was bringing all our products under one contract.

Q Well, there were prior contracts, then?

A Yes, sir.

Q Did the earlier ones have Paragraph 30?

A Yes, sir.

Q On termination?

A Yes, sir.

Q On one month's notice?

A Yes, sir. The Company has historically had that.

Q And would it have had Paragraph 27th in it on the ownership of the records?

A Yes, it would.

Q And also Paragraph 1-E, the obligation to maintain records that were to belong to the Company?

A Right.

Q All of those would have been in the earlier contracts?

A Yes, sir.

Q Of the Malley-Duff agency?

A Yes, sir.

MR. BLACK: That is all.

THE COURT: Thank you. I am presuming, then, there are no further questions.

MR. LESHER: I have no questions.

MR. TURNER: I have one question on Exhibit A, Your Honor.

THE COURT: Well, then, I think the next person in the course of our sequence would be Mr. Lesher.

MR. LESHER: I have no questions.

THE COURT: And Mr. Sachs?

MR. SACHS: No.

THE COURT: Now you can proceed.

REDIRECT EXAMINATION

BY MR. TURNER:

Q I notice that you have included on Exhibit A, or whoever prepared it did, a heading called, "West Virginia."

A Yes, sir.

Q Now, isn't it a fact that Malley-Duff also started an agency for you in Erie?

A Yes, sir.

Q Where are those figures shown?

A They are not shown on this sheet; but I can certainly—Erie is producing much more business than Pittsburgh. They are around seven or eight million.

Q Well, my question is, sir, that in some years you show Malley-Duff total, Malley-Duff including West Virginia figures, is that right?

A Yes, sir.

Q And some years, they have total sales including Erie figures.

A Yes, sir, they would have.

Q Why weren't the Erie figures put in?

A I don't know. I didn't prepare the sheet.

THE COURT: Then, if that is the case, this does not fairly and accurately represent the figures, and the Court will strike it from the evidence.

MR. TURNER: Wait, I object to this. I think that the figures, including the Erie figures are in one of the Exhibits, one of the pieces of paper. May I ask counsel if he has them.

BY THE COURT:

Q You have testified that that piece of paper does not include Erie, but that piece of paper does not accurately depict the history of the agency in question, inasmuch as it omits the Erie—

A Agency.

Q —agency, and, therefore, the Court will strike that from evidence.

MR. TURNER: Thank you, Your Honor. I have no more questions.

MR. BLACK: Your Honor, may I ask a question about Exhibit A?

THE COURT: You may.

RECROSS-EXAMINATION

BY MR. BLACK:

Q Is it true that the Erie Agency is a separate agency?

A Yes, sir. As is West Virginia. And in my testimony, we only referred to the Pittsburgh Agency.

BY THE COURT:

Q These figures in Exhibit A are the figures for Malley-Duff & Associates?

A In Pittsburgh.

MR. BLACK: In Pittsburgh.

A And this piece of paper also includes West Virginia.

BY MR. BLACK:

Q But they are shown separately?

A That's right. And we did not include them in our testimony.

Q And what the Erie Agency does is a matter of an entirely different agency?

A Right.

Q The one up in Erie?

A Right.

Q And there wasn't any reason to show it in a list of Malley-Duff agencies?

A No, sir.

Q Was there?

A No, sir.

MR. BLACK: Your Honor please, I think this—

THE COURT: Then the Court is confused. A party to this case is the Malley-Duff Agency?

MR. BLACK: Right.

THE COURT: This Malley-Duff agency extends to Erie, does it not?

MR. LLOYD: No, sir.

THE COURT: It does not?

MR. LLOYD: No, sir.

MR. BLACK: It does not include Erie and the counties surrounding Erie. But it does include the rest of Western Pennsylvania.

THE COURT: Do these figures constitute the history of the agency in question here?

MR. LLOYD: The column headed—

MR. BLACK: Please answer the Court's question.

MR. LLOYD: Yes, sir.

THE COURT: They do?

MR. LLOYD: Yes, sir.

THE COURT: Is the agency in Erie a separate agency?

MR. LLOYD: Yes, sir.

THE COURT: And is it affected by this termination notice?

MR. LLOYD: No, sir.

THE COURT: Well, the Court is confused.

MR. TURNER: Your Honor, may I try a couple questions.

REDIRECT EXAMINATION

BY MR. TURNER:

Q At one time, not today, but at one time, did Malley-Duff have a branch office in Erie?

A No, sir.

Q Did they have a branch agency up there?

A No, sir?

Q Did they have a branch in West Virginia?

A No, sir?

Q Well, then, why did you include West Virginia on that Exhibit A?

A Because Malley and Duff and Dupee owned another agency, together, in West Virginia. Malley and Duff and Oglevee jointly owned an agency in Erie.

BY THE COURT:

Q Then we are talking about something that doesn't involve this lawsuit?

A That's right.

THE COURT: I was lead astray.

MR. BLACK: These figures that this witness testified to are the Pittsburgh Figures. The fact that they also show some figures from West Virginia doesn't make the Exhibit inadmissible.

THE COURT: But the Court sees now that the Court was lead astray by counsel, and the Court does not appreciate that. The Court will receive it into evidence. Let's go on with the case, please. We are running short of time, please, proceed.

BY MR. TURNER (continuing):

Q There is a column on here, called Total, Malley-Duff. Did you see that?

A Yes, sir?

Q Does that column on Exhibit A, Total Malley-Duff, include the West Virginia sales in the years that Malley-Duff had West Virginia?

A Yes, sir, but—

Q Is the Erie situation any different than the West Virginia situation in the years in which Malley-Duff were involved in—

MR. BLACK: I think the witness, he started to say , "but," and you interrupted him. I think he ought to be allowed to finish his answer.

THE COURT: I think that we have exhausted this point. The Malley-Duff agency in this case does not involve Erie. Now, how can we beat a dead horse any more? Is this correct?

MR. BLACK: I agree.

MR LLOYD: That is correct.

THE COURT: Need we go through that anymore?

MR LLOYD: No, sir. It does not include Erie.

THE COURT: It does not include Erie?

MR. LLOYD: Nor West Virginia, no, sir.

THE COURT: Let us move on.

MR. TURNER: No more questions.

THE COURT: Thank you.

MR TURNER: Mr. Duff, please.

THE COURT: Counselor, be succinct in your questions, please. And that matter with respect to Erie, I believe, was irresponsible on your part. There is no room in this judicial proceeding for being misleading to the Court. And I will ask you to be succinct and probative in your questions.

MR TURNER: Your Honor, I apologise, if the Court so considers it. I think there was some confusion. I don't think it's straightened out yet, and I beg the Court's apology if there was some—

THE COURT: There was.

MR TURNER: It was not advertent on my part.

THE COURT: I accept that apology. Let us move on.

MR. JAMES A. DUFF, JR., called as a witness in his own before, first duly having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TURNER:

Q What is your name, please.

A James A. Duff, Jr.

Q What is your address, Mr. Duff?

A 6101 Penn Mall, Pittsburgh.

Q What is your occupation?

A I am a Vice President of Malley-Duff & Associates.

Q How long have you been so employed?

A Approximately ten and a half years.

Q And who are the owners of Malley-Duff & Associates?

A Mr. Malley and myself.

Q And how long has Mr. Malley been associated with the sale of Crown Life Insurance in Pittsburgh?

A Since 1954.

Q Now, you have an office right in the City of Pittsburgh, is that right?

A Yes, sir.

Q At one time, did you have offices in other cities, sir?

A Yes, sir. We did.

Q Where were they?

A We had an office in Erie, Pennsylvania, and an office out of State, in Charleston, West Virginia.

Q Would you look at Exhibit A, please, that has been received here, and state whether or not that is a fair and complete summary of the business done by Malley-Duff & Associates over the years?

A Yes, sir. We were responsible for the totals shown in the last column, which shows total Malley-Duff, including the other agencies.

Q Do those figures include Erie sales?

A I don't see them on the sheets.

Q But they do include sales of your West Virginia operations?

A That is correct.

THE COURT: Have the witness explain the relationship between the Erie office and the one in question. First of all, I would like to know once and for all whether the Erie office includes the Agency which is before this Court.

BY MR. TURNER:

Q Can you answer His Honor?

A Yes. Your Honor, in 1970, we acquired the—we created and built and financed an agency in Charleston, West Virginia. In 1972 we acquired and built an agency in Erie, Pennsyvania. And from 1972, we then operated three separately distinct entities.

BY THE COURT:

Q The entity—I hate to interrupt at this point—but the entity before this Court is separate and distinct from the Erie agency entity?

A That is true.

THE COURT: Let us move on.

BY MR. TURNER:

Q And it is separate and distinct from the West Virginia Agency?

A That's correct.

Q And Exhibit A includes West Virginia: is that correct?

A That is correct.

Q Did you have any quota under which you operated as an agency prior to the mid-year of 1977?

A No, sir.

Q Under what circumstances did you learn of any quota that had been imposed upon you?

A Mr. Lloyd and Mr. Craig visited Mr. Malley and I in Pitssburgh approximately a week and a half before August 19th. And in a joint meeting in Mr. Lloyd's room, we were told that we were going to placed on a quota. It was not a standard performance at that point, as I recall; it was a quota. We asked the amount and there was no discussion as to amounts. Mr. Malley asked if Mr. Lloyd would commit that in a letter. He said he would. The letter arrived August 19th, which sets forth the amount of the quota for the years 1977 through '80.

Q Was the receipt of the letter the first that you had gotten any figures that you had to meet?

A Yes, sir. Yes, sir, that's correct.

Q And what were your understandings as to the time in which you had to meet that quota?

A I had from August 19th, 1977, until December 10th, 1977, to produce approximately 150 percent of our 1976 business.

Q Were you aware of any prior instances where Crown had terminated agencies such as yours, general agents, without any cause?

A No, sir.

Q Did you have any understanding as to whether Crown generally imposed quotas upon their general agents?

A No, sir, not generally.

Q At the time the quota was imposed, were you able to form any impression as to whether you could meet that quota?

A At the time the quota was imposed?

Q Yes, sir. Did you think you could meet it or not?

A No, we did not. We had approximately three months and three weeks to fulfil the quota. We did not think we could make it, barring an exceptional circumstance, which was unpredictable at that point.

Q What do you mean by an exceptional circumstances?

A It could be, with the market, the manner in which we did business, could have brought an inquiry or a case which we might not have been aware of at any time. That is always a possibility but nothing that could be planned upon.

Q All right, now, do you know the total amount of insurance that you have sold over the years that is now in force with Crown?

A We have sold through Malley-Duff and its predecessor companies, I would estimate, about 88 million dollars of ordinary life.

Q And have you been participating in the sale of group policies, as well?

A Yes, sir. We have and I would estimate,—I don't have those figures—I would estimate about 100 million dollars of group insurance.

Q Now, what have you done, you and Mr. Malley, your co-worker, here, done over the years, to promote the business of Crown Life Insurance Company in this territory?

A We have established a rapport with general insurance people, generally, and then agents of other life companies, through advertising, and developing personal rapport with these people, through the expenditure of substantial sums of money to do whatever we thought necessary to make sure we were Crown. If I might cite an example, there is a Pittsburgh insurance directory, and we have on every cover of that directory, it's Crown Life, very large, and this lies, hopefully, on the desk of every general insurance man in the which I assume your client has the original in his possession.

(Plaintiff's Preliminary Injunction Exhibit No. 6 was marked for indentification.)

BY MR. TURNER (continuing):

Q I show you what has been marked as Exhibit 6 and identified as the contract. When you signed this, were there any negotiations on the terms or what the terms would be?

A No, sir. It was not negotiable. If you wanted to represented Crown Life Insurance as a general agent, you signed it.

Q That is a photocopy here. Is the original a printed form or is it on a typewriter?

A This form?

Q Yes.

A This is typed. Did I understand the question?

Q Is it printed or is it individually typewritten, I am saying?

A This is a printed form. It's a fill-in, type of form.

MR. TURNER: I have no more questions, Your Honor.

MR. BLACK: I have one question, Your Honor.

CROSS-EXAMINATION

BY MR. BLACK

Q Mr. Duff, this meeting that Mr. Lloyd that you testified to, that preceded the receipt of this August 19th, letter, that wasn't the first time Mr. Lloyd had indicated to you that he thought your agency ought to be performing better than it was, was it?

A Sir, the discussion at that time was not about our agency performance; he just made the statement to get him out of there, or the contract would be terminated.

Q Well, I must insist that you answer my question.

A I'm sorry.

Q Let's put it this way. The letter of August 15th, was it that you received, setting up standards, for performance that wasn't the first indication you had from Mr. Lloyd that he wanted your agency to be performing better than it had been was it?

A No, sir, to answer your question.

MR. BLACK: That is all.

BY MR. LESHER:

Q Mr. Ehrman have any discussions with you about the termination of this contract prior to receiving the letter of termination?

A No, sir, he did not.

Q To your knowledge, did he have any involvement in this matter?

A Any involvement in the termination?

Q Yes.

CROWN

LIFE INSURANCE COMPANY • 120 BLOOR STREET EAST
• TORONTO • CANADA • M4W 1B8

August 19th, 1977

Messrs. Tom Malley & Jim Duff,
Malley-Duff & Associates, Inc.
Managing General Agents,
Crown Life Insurance Company,
Pittsburgh, Pennsylvania

Dear Tom and Jim:

This letter will confirm our conversation regarding the Company's attempts to increase our share of the Pittsburgh market.

As you know, the Agency was incorporated in 1954 and is one of the older agencies within the Company. It started as Young, Malley & Kekich and shortly after the original agency was formed the three partners decided to break up and Mr. Young left the business, Mr. Kekich organized his own agency and Mr. Malley organized his own agency. The Kekich Agency and the Malley Agency operated as personal producing agents for some time with unspectacular results.

In 1967 and 1968 we suggested that Mr. Malley find a partner who would help develop the business on a more productive basis and in 1968 he was jointed by Mr. Duff. From 1969, 1970, 1971 and 1972 the Agency started to develop at a reasonable pace; in 1968 winning the Crown Life Cup and in 1974 winning the Director of Agencies Trophy. However, from 1972 to the current period the

flow of Ordinary business has been erratic and the current position of the Agency at June, 1977 both in Ordinary and Group is extremely disappointing and the prognosis for the Agency is not encouraging, particularly on the Individual side.

The number of active producing brokers is reducing and not encouraging as far as future development is concerned. It is the oldest agency in the State of Pennsylvania as far as continuing management is concerned, but its growth has not been consistent and is certainly less now than it was in the late sixties. More importantly, in comparing the effective job that Pittsburgh East End is doing in its market, and comparing it to new agencies in Pennsylvania, it is not maintaining a preeminent position as it should both due to the age and maturity of the agency and the market that it is serving.

For example, the Erie Agency in a very small community has a much more substantial paid for business for the first six months of June, 1977, as does Philadelphia, as does Pittsburgh Center, a personal producing agency in Pittsburgh. Harrisburg, a new agency, has more than half a million paid for as does Allentown another new agency in Pennsylvania.

Obviously, Allentown, Harrisburg and Erie do not have the extra support of a Group Office in their immediate territory and there is a good deal of evidence to indicate that a Group office has a synergistic effect on the production of an agency, bringing it up to the top level.

All of the foregoing is to indicate that the Agency is not fulfilling its marketing function and as a result we have decided to take three direct steps to increase our position in the market.

We will actively seek a new general agency for Pittsburgh or, alternatively, study the market penetration potential of the Jules Ehrman Agency.

We will agree to maintain the Malley Duff Agency if the following standards are met: An Ordinary Net Paid level (including Individual Health) at December, 1977 of $7,500,000; an Ordinary and Individual Health Net Paid Score in December, 1978 of $10,000,000; an Ordinary and Individual Health Net Paid Score at the end of December, 1979 of $15,000,000 and an Ordinary and Individual Health combined Net Paid level at the end of 1980 of $20,000,000. And that this level is maintained and that the Agency because of age and market remains in the top 25% of the company's agencies serving the United States.

The above levels of performance should be maintained under the current market conditions. If the market conditions substantially change so as to effect the agency's operations over which the agency and agency personnel have no control, adjustments to these standards would be made.

I am setting these conditions forth to give you our views at this time and to clearly understand the objectives that we all have in mind.

Kind personal regards.

Sincerely,
C. B. LLOYD

C.B. Lloyd:yj

Senior Agency Vice-President
for the United States

CROWN

LIFE INSURANCE COMPANY • 120 BLOOR STREET EAST
• TORONTO • CANADA • M4W 1B8

October 4th, 1977

Messrs. Tom Malley & Jim Duff,
Malley-Duff & Associates, Inc.
Managing General Agents,
Crown Life Insurance Company,
Pittsburgh, Pennsylvania

Dear Tom and Jim:

In reviewing the 15th September Production Summary I note that in September, 1976 the Net Settled Issues Ordinary totalled $2,692,059 and the Net Paid for the same period was $2,892,799. At September, 1977 the Net Settled Issues were $3,049,929 and the Net Paid Ordinary for the same period $3,204,500. The total Net Paid including Individual Disability and Group at the 15th September, 1976 was $3,685,651 and the Net Paid in September, 1976 was $3,886,505. The Net Settled Issues for the same period by September 15th, 1977 had reduced to $3,273,509 and the Net Paid by September, 1977 was $3,554,250.

The potential net Paid for the current year is $147,000 and it is at this point very difficult to see how the agency can reach the reasonable quotas that we discussed previously. I strongly urge you to put forth every effort to avoid the

termination of your contract for lack of production at the beginning of 1978.

Kind personal regards.

Sincerely,
C. B. LLOYD

C.B. Lloyd:yj

Senior Agency Vice-President
for the United States

c.c. Mr. M. B. Hutchison

CROWN

LIFE INSURANCE COMPANY • 120 BLOOR STREET EAST
• TORONTO • CANADA • M4W 1B8

REGISTERED

January 11th, 1978

air mail

Malley-Duff & Associates Inc.
Crown Life Insurance Company,
Liberty Building,
6101 Penn Mall
Pittsburgh, Pennsylvania 15206

Attention: Mr. James A. Duff Jr.
Mr. Thomas E. Malley

Dear Sirs:

The Company hereby gives notice of termination pursuant to Provision 30 of your General Agency Agreement which took effect September 1st, 1977.

Termination becomes effective one month from the date of mailing of this letter.

Your truly,
D. B. SULLIVAN

D. O'Sullivan,
Assistant Sup[illegible]ndent,
Agency Administration.

DO:lc

Malley-Duff Net Paid History

		Pittsburgh East End		West Virginia	Total Malley-Duff
1962	Malley	64,478			64,478
63		986,754			986,754
64		1,115,385			1,115,385
65	Malley & Assoc.	914,431			914,431
66		1,096,175			1,096,175
67	Malley-Duff	1,800,000			1,800,000
68		3,479,298			3,479,298
69		4,959,657		1,068,500	6,028,157
70		6,908,512		4,883,750	11,792,262
71		7,325,867		1,071,760	8,397,627
72		7,983,144		3,844,848	11,827,992
73		5,473,671		2,407,117	7,880,788
74		6,726,303		2,849,171	9,575,474
75		8,288,944	sold to	(2,468,111)	8,288,944
76		5,176,478	Dupay	(7,347,069)	5,176,478
77		5,518,155		(2,364,337)	5,518,155

CERTIFICATE OF SERVICE

certifies that a true and correct copy of has been served by hand-delivery this 29th following counsel:

Alexander Black, Esquire
Buchanan, Ingersoll, Rodewald
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No. 86-497 and 86-531

In the Supreme Court of the United States

October Term, 1986

AGENCY HOLDING CORPORATION, ET AL.,
Petitioners

vs.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent

CROWN LIFE INSURANCE COMPANY, ET AL.,
Petitioners

vs.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief For Petitioners Crown Life Insurance Company and Clarke Burton Lloyd

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Certiorari Granted December 1, 1986

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QUESTIONS PRESENTED

PARTIES TO THE PROCEEDINGS

Petitioners, Crown Life Insurance Company and Clarke Burton Lloyd, were Appellees below on the issues presented for review.[1]

Clarke Burton Lloyd is an individual, a Canadian citizen and a resident of Chicago, Illinois. Respondent, Malley-Duff & Associates, Inc., was Appellant below on the issues for review. Malley-Duff & Associates, Inc. is a Pennsylvania corporation which has its office in Pittsburgh, Pennsylvania.

Crown Life Insurance Company is a partly owned subsidiary of Crownx, Inc., which has its headquarters in Toronto, Ontario, Canada. The following are nonwholly owned subsidiaries of Crown Life Insurance Company: Crown Financial Management Limited with headquarters in London, United Kingdom; Crown Eagle Life Insurance Company Limited with headquarters in Jamaica; and Crown Life Carribean Limited with headquarters in Trinidad, Tobago.

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[1]The other parties who were Appellees below were Agency Holding Corporation, an Illinois corporation, Agency Holding Corporation, an Ohio corporation, Kerry Patrick Craig, Diane Pariano, Erhman Ratini Oglevee and Craig, Inc., a Pennsylvania corporation, and Robert Oglevee.

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The opinion of the Court of Appeals (Joint Appendix, hereinafter referred to as "A" p. 70) is reported at 792 F.2d 341. The District Court's ruling granting the Petitioners' motion for summary judgment is not officially reported, but is provided in the Appendix (A 56).

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1986. Petitioners filed a timely petition for rehearing under Federal Rules of Appellate Procedure 35(b) and 40(a). On July 1, 1986, the petition was denied (A 104). Petitioners filed a timely petition for Writ of Certiorari on September 29, 1986. The petition was granted on December 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, provides in relevant part:

> Any person injured in his business or property by reason of violation of Section 1962 of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Id. at § 1964(c).

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has

participated as a principal within the meaning of Section 2, Title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

Id. at § 1962.

The relevant Pennsylvania statute of limitations, 42 Pa.Con.Stat.Ann. § 5524 provides:

> The following actions and proceedings must be commenced within two years:
>
> (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.
>
> (3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.
>
> (4) An action for waste or trespass of real property.
>
> (5) An action upon a statute for a civil penalty or forfeiture, where the action is given to a government unit.
>
> (6) An action against any officer or any government unit for the nonpayment of money or the nondelivery of property collected upon on execution or otherwise in his possession.

The catchall statute of limitations provision, 42 Pa.Con.Stat.Ann. § 5527 provides:

> The following actions and proceedings must be commenced within six years:
>
> . . .

> (6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation).

STATEMENT OF THE CASE

Malley-Duff & Associates, Inc. ("Malley-Duff"), a Pennsylvania corporation, was general agent in the Pittsburgh area for petitioner, Crown Life Insurance Company ("Crown"), a Canadian corporation engaged in the business of selling life, health and accident insurance, under a general agency contract which contained the following provision:

> This agreement may be terminated on one month's notice by either party and such notice will be deemed to be given when a registered letter containing the notice is mailed, addressed to the party entitled to the notice at the party's last known address.

Under date of January 11, 1978, petitioner, Crown, wrote by registered mail to Malley-Duff giving notice of termination pursuant to the above quoted provision, effective one month from the date of mailing the letter. On February 10, 1978, Malley-Duff brought suit in equity in the Court of Common Pleas of Allegheny County, Pennsylvania, against Crown and Clarke Burton Lloyd, then its Vice President for United States Agencies, seeking to enjoin the termination of the agency contract, and by motion dated February 10, 1978, asked for a preliminary injunction. A hearing on the motion was held before Judge (now Justice) Flaherty on February 15 and 16, 1978, and after the submission of Briefs, Judge Flaherty entered an Order dated February 22, 1978, stating, " . . . the motion

for preliminary injunction is herewith refused." Thereafter, Crown filed a Preliminary Objection asserting the availability of an adequate, nonstatutory remedy at law, and asking that the case be transferred to the law side, but this objection was never brought on for argument. The plaintiff has permitted the equity suit to remain dormant.

On April 5, 1978, Malley-Duff filed an action in federal court (*Malley-Duff I*) against the present Petitioners and the Crown general agents in Chicago and Cleveland, and an individual, Kerry Patrick Craig ("Craig"), complaining about the selfsame termination of its general agency contract with Crown Life, this time setting forth eight counts (Civil Action No. 78-373-W.D.Pa.). This action asserted claims under the federal antitrust laws for conspiracy and monopolization and under the common law of Pennsylvania for breach of contract, malicious interference with the contract, conspiracy or concerted refusal to deal, and for punitive damages.

Between April 5, 1978, and March 20, 1979, Malley-Duff engaged in discovery involving, inter alia, extensive requests for production of documents and ten depositions. During the deposition of Diane Pariano on November 21, 1978, Malley-Duff's counsel questioned her at length about the shredding of documents in Agency Holding's Chicago office, which Malley-Duff now claims constituted an obstruction of justice and part of its RICO injury. Malley-Duff also claims that Miss Pariano's testimony, at the deposition, was an instance of perjury which it refers to in its complaint as a predicate act. On December 10, 1978, Mrs. Kenneth Backhus testified that she observed the shredding of documents in the Chicago office of Agency Holding. In addition, Malley-Duff became aware in December, 1978, of the alleged obstruction of justice involving the hiding of

secretary/receptionist Miss Marie Beemsterboer from a United States Marshal—an incident which Malley-Duff also asserts caused it RICO injury.

A five-week trial began on March 8, 1983. At the conclusion of plaintiff's evidence, a directed verdict was granted by the trial court in favor of all of the defendants on each of the counts asserting a violation of the antitrust laws and the count charging breach of contract. The other common law claims were permitted to go to the jury. The jury found that there was no liability for tortious interference with a contractual relation and no liability for a conspiracy with the intent to injure, and refused to assess punitive damages. Some of the defendants, namely Crown, Lloyd and Craig, were found to be liable in the amount of $900,000 on a theory of conspiracy to tortiously interfere with a contract.

All parties appealed to the Court of Appeals for the Third Circuit. On May 7, 1984, that Court reversed the trial court, reinstated the antitrust counts and ordered a new trial, overturning the jury verdict against the defendants. *Malley-Duff & Associates, Inc. v. Crown Life Insurance Company, et al.*, 734 F.2d 341 (3rd Cir. 1984). A Petition for Certiorari to the United States Supreme Court was filed timely. The Petition was denied.

Meanwhile, on March 20, 1981, Malley-Duff had commenced this second action against Crown, Lloyd and various other defendants (*Malley-Duff II*). Malley-Duff alleged violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (Supp. 1970-83) ("RICO"), the Civil Rights Act, 42 U.S.C. § 1985 and the common law of Pennsylvania, based upon alleged acts of some defendants during and in connection with the litigation of *Malley-Duff I*. *Malley-Duff I* and *Malley-Duff II*

were consolidated for discovery purposes, but prior to the date set for trial, the Court severed the two actions, and *Malley-Duff I* was tried alone.

Following the trial of *Malley-Duff I*, on March 23, 1984, the District Court granted defendants' motion for summary judgment on all federal law counts in *Malley-Duff II* and dismissed the state law claims (A 56-68). Malley-Duff appealed from that order. On May 30, 1986, a panel of the Court of Appeals for the Third Circuit reversed the District Court's grant of summary judgment on the RICO claims, as well as most of those under § 1985(2), and reversed the dismissal of the pendent state claims (A 70).

Crown Life Insurance Company and Clarke Burton Lloyd filed a timely petition for rehearing pursuant to Federal Rules of Appellate Procedure 35(b) and 40(a). On July 1, 1986, the petition was denied (A 104). On September 29, 1986, Crown Life Insurance Company and Clarke Burton Lloyd filed a timely petition for writ of certiorari, which petition was granted on December 1, 1986.

STATEMENT OF THE FACTS

During the years immediately prior to the decision to terminate Malley-Duff, the production of that agency had leveled off. This leveling of production occurred at a level just in excess of Five Million ($5,000,000) Dollars annually. That figure represents the threshold at which a Crown general agent is rewarded with an increased bonus, in addition to regular commissions, the increased bonus being computed on the entire $5,000,000, as well as on any additional production. The production level regularly attained by Malley-Duff indicated that once this threshold was attained and the increased bonus on past production

received, no further effort was expended. Malley was no longer willing to devote the time and effort necessary to increase the Agency's production. Duff wanted to buy Malley's interest in the agency, but putting more business on the books would only have raised the net worth of the agency and, hence, the price of Malley's interest. The result was a standoff. Crown recognized this fact and urged Malley-Duff to increase its penetration in the Pittsburgh market. These requests went unheeded. Crown had repeatedly warned Malley-Duff that its representation of Crown in the Pittsburgh market had been grossly inadequate. Despite these warnings, Malley-Duff's production continued to lag.

On August 19, 1977, confirming an earlier conversation, defendant Lloyd, wrote Malley-Duff and set forth a standard of production that was expected of Malley-Duff in order to retain its status as the Crown Life general agent in Pittsburgh. This warning was repeated by letter two months later. Malley-Duff failed to improve its marketing efforts. Lloyd recommended that Malley-Duff be terminated as general agent. This recommendation was adopted by senior management. On January 11, 1978, Crown wrote to Malley-Duff giving notice of its intent to terminate Malley-Duff as its general agent in Pittsburgh pursuant to the express provisions of the general agency contract. Upon the request of Malley-Duff, the termination was reconsidered by Crown but Lloyd's superiors, Michael Hutchison, Marketing Vice President of Crown, and Robert Dowsett, President of Crown, adhered to their decision to terminate Malley-Duff. Termination became effective on February 11, 1978.

SUMMARY OF ARGUMENT

A. In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court reasserted the federal interest in uniformity and the interest in having firmly defined, easily applied rules for statutes of limitations for federal claims. This Court identified the essence of all 1983 claims as being claims for personal injury. Congress provided the Court with an accurate characterization of the essence of claims under RICO's civil enforcement provisions when it stated that those who could seek relief were those who were injured in their business or property by reason of a violation of Section 1962. The simplicity and merit of looking at the injury or the interests protected rather than at the particular facts or precise legal theories was recognized in *Wilson v. Garcia, supra*. Following that principle this court should hold that a state's statute of limitations for a claim for injury to business or property should apply to all civil RICO claims. For cases arising in Pennsylvania the statutory period is two years.

B. Because Malley-Duff, contrary to the averments in its complaint, has now admitted that there was no pattern of racketeering activity or conspiracy in existence at the time it was terminated as general agent for Crown Life, this court should hold that it can have no RICO cause of action for that injury. If Malley-Duff, contrary to its prior admissions, now alleges that a conspiracy had begun prior to its termination, the statute of limitations began to run at the time of the termination injury for any recovery for this injury, and not at some later date when other alleged predicate acts occurred.

ARGUMENT

I. The State Statute of Limitations most analogous to a claim for injury to business or property should be applied to all civil RICO claims.

A. The Rackateer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1961-1968 (1982 & Supp. II 1984) does not contain a specific statute of limitations governing RICO actions. When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). This case involves the selection of the "most appropriate" or "the most analogous" state statute of limitations to apply to this RICO claim.

In *Wilson v. Garcia* this Court said that in order to determine the "most appropriate" or "most analogous" state statute, three questions must be answered.

> 1. First, whether the state law or federal law governs the characterization of a § 1983 claim for statute of limitation purposes.
>
> 2. If a federal law applies, should all § 1983 claims be characterized in the same way or should they be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.
>
> 3. A court must characterize the essence of the claim in the pending case and decide which state statute provides the most appropriate limiting principle.

Although the opinion in *Wilson v. Garcia* referred extensively to § 1988 of the Reconstruction Civil Rights

Acts, the language of that section appears to be a restatement of what courts should do in every case where there is a federal act that contains no specified statute of limitations. RICO, with its enumerated predicate acts, is so like the numerous rights for which protection has been sought under § 1983, that the three-step test established in *Wilson v. Garcia* is appropriate for an analysis of this case.

It seems clear that the matter of characterization of the claim should be treated as a federal question. The characterization "is ultimately a question of federal law". *Autoworkers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966). Only the length of the limitations period and closely related questions of tolling and application are to be governed by state law. *Johnson v. Railway Express Agency Inc.*, 421 U.S. 454, 464 (1975). In *Wilson v. Garcia*, there was a conflict with the ruling of the New Mexico Supreme Court as to which statute of limitation should apply but there is no such conflict in this case.

Section 1983 was characterized as a "uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Wilson v. Garcia, supra.* at 271-272, *quoting Mitchum v. Foster*, 407 U.S. 225, 239 (1972). Most of the federal district and circuit courts which have considered civil RICO actions since *Wilson v. Garcia* have held that it applies to RICO cases whether or not RICO is deemed to be a "uniquely federal remedy."[2] Certainly

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[2]In addition to the Third Circuit, other courts have found that the reasoning of *Wilson v. Garcia* justifies the application of a single state statute of limitations period for all civil RICO causes of action. *Tellis v. United States Fidelity & Guarantee Co.*, 805 F.2d 741 (7th Cir. 1986); *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011 (11th Cir. 1986) (dicta); *Davis v. A.G. Edwards & Sons, Inc.*, 635 F. Supp. 707 (W.D. La.

(Continued on next page)

there were no RICO laws in any of the states before the enactment of the federal RICO law, and in many of the so called state RICO statutes, there is no private civil remedy. States could have enacted civil rights acts which parallel the federal acts and in such cases could rely on the state constitution as well as the federal constitution in granting remedies.

When addressing the question, whether all federal Civil RICO claims should be characterized in the same way for limitations purposes, it is important to keep in mind the practical considerations and the statute's remedial purpose, both of which favor a simple broad characterization of all civil RICO claims. The experience of the courts that have predicated their selection of a statute of limitations upon an analysis of the particular facts of each claim, whether in RICO or in § 1983 claims, demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation. If almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations, the history of RICO litigation is at least as confusing. If the choice of the statute of limitations were to depend upon the particular facts, predicate acts, or the precise legal theories alleged in each claim, counsel could almost always argue that two or more periods of limitations should apply to each RICO claim.

This is particularly apparent in this case in which an action based on tortious interference was filed by Malley

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(Continued)
1986); *Argosy v. Bradley*, 628 F. Supp. 1359 (D. Utah 1986); *Morley v. Cohen*, 610 F. Supp. 798 (D. Md. 1985); *Victoria Oil Co. v. Lancaster Corp.*, 587 F. Supp. 429 (D. Colo. 1984).

Duff almost three years before its RICO action was filed. By creative pleading, the same injury described in the prior case was characterized as mail fraud in the present case in order to place it under one of the prescribed predicate acts of § 1961. The basic injury remained the same, tortious interference with the business of Malley-Duff. So long as the courts look to the pleadings and the facts rather than to the injury or interests protected there will always be the type of uncertainty which breeds unnecessary litigation. It is unlikely that Congress actually foresaw the wide application of RICO to many of the types of claims that now comprise at least 90% of its cases.[3] Certainly Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty and unproductive and ever increasing litigation.

Uniformity within each state is entirely consistent with the borrowing principle followed when there is no federally specified statute of limitation. "The federal interest in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach." *Wilson v. Garcia*, 471 U.S. at 270.

The third step requires that the court characterize the essence of the claims. The Court of Appeals in *Wilson v. Garcia* had exhaustively reviewed the different ways that § 1983 claims had been characterized before concluding that the tort action of recovery for personal injuries is the best alternative available. *Id.* at 276-278. This Court agreed and held that one staute of limitations should apply to all § 1983 claims. This uniform approach was possible

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[3]Sedima, S.P.R.L. v. Imrex. Co., ___ U.S. ___, 105 S. Ct. 3275, 3287 n. 16 (1985)

because this Court looked not to the causes of injury but to the nature of the injury in characterizing the essence of § 1983 claims.

An analysis of the RICO act for the essence of civil RICO causes of action requires no exhaustive review. Section 1964(c) of RICO provides pertinently that "any person injured in his business or property by reason of a violation of § 1962 of this chapter may sue therefor . . . ." When characterizing the essence of civil RICO by focusing on the nature of the injury and interests protected, rather than the facts and circumstances or legal theories, it is clear that the nature of the civil RICO remedy is to confer a remedy for injury to business or property.[4] The characterization of all RICO actions as involving claims for injuries to business or property minimizes the risks that the choice of a state statute of limitations would not fairly serve the federal interests protected by RICO.

The relevant Pennsylvania statute of limitations, 42 Pa.Con.Stat.Ann. § 5524 provides:

> The following actions and proceedings must be commenced within two years:
>
> (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by

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[4]In this case, the Third Circuit went astray when it said "Clearly, we should not expect an epiphany through which the 'essence' of civil RICO is revealed to us." (A 89) Instead of characterizing the essence of the claim it looked in vain for a statute of limitations that would cover every possible RICO theory and, finding none, opted for the catch-all statute.

the wrongful act or neglect or unlawful violence or negligence of another.

(3) *An action for* taking, detaining or *injuring personal property*, including actions for specific recovery thereof.

(4) *An action for* waste or *trespass of real property*.

(5) An action upon a statute for a civil penalty or forfeiture, where the action is given to a government unit.

(6) An action against any officer or any government unit for the nonpayment of money or the nondelivery of property collected upon on execution or otherwise in his possession. (Emphasis supplied.)

The gravamen of Malley-Duff's Complaint is that its business was injured by the termination of its agency agreement with Crown.

Personal property, as defined in Pennsylvania is "everything except real estate," *McGlathery's Estate*, 311 Pa. 351, 354, 166 A. 886, 887 (1933), and includes intangible personal property. *Home for Crippled Children v. Erie Insurance Exchange*, 130 P.L.J. 480 (C.P. Alleg. 1982), *aff'd. mem.* 329 Pa. Super. 610, 478 A.2d 84 (1984) (analyzing the present relevant statute and holding that tortious interference with a contractual relationship is controlled by the two-year statute). Accordingly, personal property includes a business. In fact, the Third Circuit itself adopted the reasoning of *Home for Crippled Children* and held that the two-year statute of limitations period applied to a claim for tortious interference with employment contracts. *Mazzanti v. Merck & Co.*, 770 F.2d 34, 36 (3rd Cir. 1985). In addition, § 5524(4) provides a two-year period for tortious conduct affecting real estate. A more

appropriate statute of limitations period cannot be found under Pennsylvania law.

Although, as the Third Circuit pointed out, Section 5524 might not apply to all of the predicate acts, it would apply to any trespass against business or property encompassed by 18 U.S.C. § 1964(c). Tortious interference with business or property is the evil against which the Congress enacted RICO and provided a protective civil remedy.

If the courts are to limit an unfettered use of the RICO statute in cases not involving organized crime, it would be most appropriate to apply the same state statute which is used in a claim for injury to business or property. In Pennsylvania, § 5524(3) and (4) are specifically concerned with providing protection against tortious interference with businesses or other property. A two-year limitation would not be contrary to the federal mandate. In fact, it would indeed be strange to find that a two-year statute of limitations would apply in the case of a common law claim for tortious interference with a business relationship, but that a claim for the same tortious interference with the same business relationship would have a six-year statute of limitations because it was framed as a RICO violation.

The application of this limitations period is in no way inconsistent with the underlying policies or remedial purposes of RICO. Arising on essentially the same factual allegations as respondent's tortious interference with business claims alleged in *Malley-Duff I*, the timeliness of respondent's RICO claims also should be judged by the same two-year statute of limitations.[5]

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[5]The statute of limitations for tortious injury to property, real or personal, is at least two years in every state except Louisiana where it is one year.

B. Even if a particularized approach to the statute of limitations for RICO claims were to be adopted, the most appropriate and most analogous Pennsylvania statute of limitations in this case is the two-year statute for tortious injury to personal property. Should the Court decide to look at the facts alleged and legal theories asserted in order to characterize the cause of action most closely analogous, it should reach the same result. It should be noted in this context that the Third Circuit was factually incorrect when it stated that the parties agreed that common law fraud was the most analogous state cause of action to the present RICO claim. (A 76) (See, Brief of Crown and Lloyd to the Third Circuit, p. 15-16.)

As stated in A. above, the gravamen of Malley-Duff's Complaint in this action, as it was in *Malley-Duff I*, is that its business was injured by the termination of its agency agreement with Crown. Although proof of respondent's RICO claim may require proof of certain elements beyond those required to establish common-law tortious interference, no closer analogy is available under Pennsylvania law. Under Pennsylvania law, as set forth in section A. above, there exists a two-year statute of limitations period for any action concerning injury to one's business or property, real or personal.

C. There are no Federal policies or laws which should cause this Court to turn away from the norm of borrowing the state's limitations periods for injury to business or property. Judge Sloviter, in her concurrence in a case that was consolidated with this case for argument below, *A. J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 338-341 (3d Cir.1986), would have looked to the four-year statute of limitations in the Clayton Act, 15 U.S.C. § 15b.

This statute of limitations was added to the original Clayton Act in 1955. On at least three subsequent occasions, however, a proposed act or proposed amendments to RICO which would have inserted a specific statute of limitations were rejected or withdrawn. See Senator Hruska's proposed S.1623 submitted in 1969 (115 Cong. Rec. 6995-6996); Representative Steiger's proposed amendment to S.30, the Organized Crime Control Act of 1970. (116 Cong. Rec. 35227-35228, 35346-35347); and, S.16, the Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972, which would have amended Section 1964 of RICO (118 Cong. Rec. 29368).

Although the section providing for civil causes of action in RICO began with language similar to a like section of the Clayton Act, the nature of the private causes of action under the two sections differ widely. The Clayton Act has no section analogous to § 1961 of RICO which sets forth the predicate acts on which a pattern of racketeering activity must be based. Most, if not all, RICO cases have been brought to recover for injury caused by the predicate acts. *Sedima* rejected the concept of requiring a special "racketeering injury." By contrast, a private action under the Clayton Act requires an "antitrust injury." Accordingly, the apparent similarity in the civil remedy provisions of RICO and the Clayton Act belie the fundamental differences between them.

Had RICO been held to require a prior criminal conviction before a civil action could be brought, then a lengthy limitations period might have been appropriate. But when all that is required is proof of at least two predicate acts that establish a pattern, there is no federal policy which would require a limitations period in excess of that given by each state for the most analogous cause of action.

Judge Sloviter noted in *A. J. Cunningham Packing Corp. v. Congress Financial Corp., supra.* at 341, that if state law were to be applied, the most appropriate statute to apply, at least for claims accruing after 1983, is the two-year limitations period for actions seeking redress for most tortious behavior, § 5524, *supra.* Her caveat as to post 1983 claims may have been because there was a question between 1978 and 1983 relating to the statute of limitations for common law fraud in Pennsylvania. There is, however, no question that the Pennsylvania statute of limitations for injury to business or property was two years at all the relevant times in this case.

II. RICO does not provide a civil remedy for a person allegedly injured by a predicate act when as that person admits there was no pattern of racketeering activity and there was no conspiracy in existence at the time of injury.

In Count I of its Complaint, Malley-Duff alleged that on or before January 1, 1976, defendants Lloyd, Craig and Crown associated themselves as an enterprise, the purpose of which was to acquire, takeover and eliminate various Crown agencies that had lucrative territories in the United States. (Paragraph 18) (A 7).

It stated that the enterprise affected interstate commerce through its acquisition and maintenance of Crown agencies in Pittsburgh, Erie, Chicago, Peoria, Toledo, Cleveland, Newark, Hartford, Denver and elsewhere. (Paragraph 19) (A 8).

The Complaint alleged that the defendants conspired to conduct the enterprise's affairs through various acts of racketeering which included acquiring various Crown agencies, including plaintiff's, by false and fraudulent

means and pretenses through use of mail and wire communication. (Paragraph 21(a)) (A 8).

Another alleged act of racketeering was to cause renewal commissions to be transferred from the plaintiff to one or more of the defendants. (Paragraph 21(d)) (A 9).

It further said that through acts similar to those averred in subparagraphs (a)-(d), defendants acquired Crown agencies and defrauded and terminated general agents out of renewal commissions in Chicago, Peoria, Cleveland, Newark, Hartford, Denver and elsewhere. (Paragraph 21(e)) (A 9).

In paragraph 21(f) of its Complaint, respondent alleged obstruction of justice in connection with discovery in *Malley-Duff-I* which included destroying documents requested in that lawsuit and obstructing a United States Marshal in the performance of his duties as well as suborning perjury of witnesses deposed by plaintiff in *Malley Duff I*.[6]

Count I alleges a violation of 18 U.S.C. § 1962 (d). Other counts incorporate the averments of Count I by reference and allege violations of § 1962(a)(b) and (c).

At least as early as the state court preliminary injunction hearing, which was held before Judge, now Justice, Flaherty on February 15th and 16th, 1978, Malley-Duff knew that Craig had been, since September, 1977, President of Agency Holding of Illinois, the Crown Life general agent for Chicago and most of the state of Illinois, and that he had been Vice President and had an ownership interest

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[6]District Court Judge Alan N. Bloch specifically charged the jury in the trial of *Malley Duff I* that there was no evidence connecting Crown or Lloyd with the destruction of any evidence (Trial Transcript of April 14, 1983, p. 3264).

in the Crown Life General Agency in Cleveland, Ohio, from approximately the same time. Malley-Duff also knew, at least from the time of that hearing, that Agency Holding Corporation of Illinois had been the General Agency for Crown Life for the state of Illinois since March, 1977, replacing the previous general agent.

In the lengthy trial of *Malley Duff I* in which similar allegations as to non-payment of renewal commissions were made, respondent's counsel agreed that it had presented no evidence of failure to pay the proper vested renewals and that issue did not go to the jury.

A. The summary judgment that was awarded to petitioners by the District Court judge in this case was based on a two-year statute of limitations. In order to avoid the holding that its claim for termination in Pittsburgh was time-barred, Malley-Duff, in its Brief before the Third Circuit as well as at oral argument, argued that no cause of action had accrued under RICO on or before the termination of its Agency.

> . . . [T]he District Court erred by computing the statute of limitations from a date which preceded the existence of a cause of action under RICO. The trial court inexplicably segregated plaintiff's RICO claims into the constituent acts of racketeering, which injured Malley-Duff, i.e., the mail fraud resulting in Malley-Duff's termination and the obstructions of justice (Footnote 12). It then applied the statute of limitations not to Malley-Duff's RICO claim, but to the first racketeering activity, mail fraud, as if plaintiff were suing directly under 18 U.S.C. § 1341.

Malley-Duff Brief to the Third Circuit, p. 32.

> When defendant fraudulently terminated plaintiff, *no RICO cause of action existed since there were no multiple acts of racketeering.*

Id. at 33-34 (Emphasis added).

> Such computation anomalously caused the statute of limitations to begin *before a cause of action existed under RICO.*

Id. at 34. (Emphasis added).

> At a minimum, the statute of limitations for a RICO claim cannot commence until the cause of action has accrued.

Id. at 34-35.

> Ignoring the requirement of a pattern of racketeering activities, the court assumed that Malley-Duff could have brought a RICO claim immediately after its fraudulent termination, *the first predicate act.*

Malley-Duff Supplemental Brief, p. 2. (Emphasis added).

> As noted above, and in Appellant's principal Brief, the District Court inexplicably seized upon Malley-Duff's mail fraud allegations as if plaintiff could have commenced a RICO action at the time of its termination. Judge Bloch computed the statute of limitations from that date *even though no cause of action under RICO had accrued.*

Id. at 8 (Emphasis added).

All of the above admissions of Malley-Duff were made in its Briefs to the Third Circuit on the summary judgment issue. The inability of respondent to identify predicate acts other than the August 1977 letter, in connection with its termination, or predicate acts in the acquisition of the general agencies in Chicago and Cleveland, both of which

agencies were acquired by Craig prior to its termination, underscores the frivolousness of Malley-Duff's RICO claim.

Subsections (a), (b), and (c) of § 1962 of RICO all require a "pattern of racketeering activity." At Footnote 14 of *Sedima, supra*, page 3285, this Court said:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires at least two acts of racketeering activity,*" § 1961(5) . . . The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." (Emphasis added).

Section 1964 of RICO states, in pertinent part:

> Any person injured in his business or property *by reason of a violation of Section 1962 of this chapter* may sue therefor in any appropriate United States District Court . . . (Emphasis added).

Since *Sedima*, a number of courts have attempted to take a fresh look at what constitutes a pattern. Because RICO requires a minimum of two predicate acts, under even the most liberal of these new concepts of pattern, one admitted predicate act cannot constitute a pattern.

One concept of pattern recognizes that a "pattern" connotes a multiplicity of events:

> Surely the continuity inherent in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the same criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828, 831 (N.D. Ill. 1985) (Emphasis in original).

The *Inryco* court suggested that a pattern requires more than a single scheme, *Id.* at 833, and, like *Sedima*, emphasized the "continuity plus relationship" concept.

In *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986), the Eighth Circuit also adopted the *Inryco* position that several predicate acts comprising one continuing scheme was insufficient to constitute a pattern, especially when there was no proof that the defendants had ever done these activities in the past, or that they were engaged in criminal activities elsewhere. *Id.* at 257.

Put simply, subsections 1962(a), (b) and (c) require, at a minimum, two predicate acts. This Court said, ". . . [T]he compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern. . . ." *Sedima*, 105 S. Ct. at 3286. Because there had been only one alleged predicate act at the time Malley-Duff's agency agreement was terminated, its business had not been injured by a *pattern of racketeering activity* and, therefore, Malley-Duff can have no RICO cause of action under subsection (a), (b) or (c).

Alleged acts that occurred after the termination do not give Malley-Duff a RICO cause of action under subsection

(a), (b) or (c) for the alleged injury that occurred on February 11, 1978. A *cause* of a RICO injury (a pattern of racketeering activity) can not be preceded by its *effect* (a RICO injury).

B. It is quite clear from the admissions made by Malley-Duff in its Brief to the Court of Appeals that no pattern of racketeering activity which would have given it a cause of action under subsections (a), (b) or (c) of 1962 of RICO existed at the time in 1978 when Crown Life terminated Malley-Duff's brokerage general agency contract in Pittsburgh. The admissions, when coupled with Count I of its Complaint, should also be taken to admit that there was, in fact, no conspiracy in existence at that time to violate subsection (a), (b) or (c) of 18 U.S.C. § 1962.

On the other hand, Malley-Duff could argue that its admissions do not concede that there was no such conspiracy in existence at the time an injury was done by an overt act pursuant to the conspiracy. RICO does not give a plaintiff a cause of action under subsection 1962(d) unless there is a conspiracy to violate subsections 1962(a), (b) and (c) *and* the plaintiff is injured in its business or property by an overt act. Although no pattern of racketeering existed when Malley-Duff's brokerage general agency in Pittsburgh was terminated, if the termination was an overt act pursuant to a then existing conspiracy to violate one of the subsections (a), (b), or (c), Malley-Duff may argue that there was a violation of subsection (d) and a cause of action accrued at the time of the injury.[7]

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[7] *Bankers Trust Company v. Feldman*, 65 R.R. 470 (S.D.N.Y. 1986), seems to assume that the victim of the first predicate act in what later became a pattern would have no RICO claim unless the rule on accrual can be distorted by allowing later predicate acts to relate back to an injury done when only one predicate act had occurred. Such distortion is unnecessary, since subsection (d) could cover the case.

It should be pointed out that liability under subsection (d) would exist only if the conspiracy contemplated that a pattern of racketeering activity had or would come into being and through it a violation of the other subsections would occur. But if Mally-Duff now claims it has proof of such a conspriacy, as it alleged in its complaint, a RICO cause of action would have accrued at the time of its injury. If that is true, Malley-Duff's claim under (d) would be barred by the two-year statute of limitations.

The principal damage alleged by Malley-Duff was the termination of the agency. By Malley-Duff's own admission, the only predicate act alleged to precede the termination of the agency was the so-called bogus quota letter of August 19, 1977. Malley-Duff has already sued these Petitioners and others under antitrust and common law tortious interference claims. Just because it does not have a RICO cause of action in connection with the termination of the agency, does not mean that it does not have recourse if it can establish either antitrust or common law grounds for recovery.

III. If Malley-Duff has a RICO cause of action for recovery for its termination injury, the statute of limitations began to run on the date of injury.

Although state law must provide the applicable statute of limitations period for civil RICO causes of action, when the statute of limitations period starts to run is a matter of federal, not state, law. *Rawlings v. Ray*, 312 U.S. 96 (1941). The general federal rule is that a statute of limitations begins to run when a plaintiff knows or should know of his injury.

The great majority of courts that have addressed the issue have held that the general federal rule should apply in

the civil RICO context. In *Bowling v. Founders Title Co.*, 773 F.2d 1175 (11th Cir. 1975), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1516 (1986), for example, the court vacated a jury verdict in favor of two of the plaintiffs under § 1962(c), holding that the complaint was filed later than one year after the plaintiffs had learned of their injury. In *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984), the court applied the general rule in affirming the grant of summary judgment on a § 1962(d) claim. The court noted in its opinion that it is not necessary that a plaintiff "have knowledge of all of the details or all of the persons involved in order for his cause of action to accrue." *Id.* at 1433.

In the present case, there is no question that Malley-Duff knew on February 11, 1978, of the injury that it allegedly sustained on that date. The statute of limitations began to run on that date for any civil RICO claim for injury that it may have sustained at that time.

A few courts have taken the position that the statute of limitations starts to run when the plaintiff has knowledge or reason to know of the injury from the last predicate act on which he relies. *Bankers Trust Company v. Feldsman*, 65 B.R. 470 (S.D.N.Y. 1986); *See also, County of Cook v. Berger*, No. 83C 3401 (N.D. Ill. November 24, 1986) (Holding that the limitations period starts to run from the last *overt* act of an alleged civil RICO continuing conspiracy claim.)

The reasoning of courts allied with *Bankers* is misplaced. Although RICO does not require a competitive or "racketeering injury," nor any injury "separate from the harm from the predicate acts," one must, nevertheless, be injured "in his business or property by the conduct constituting the violation." *Sedima*, 105 S. Ct. at 3286. "[T]he

compensible injury necessary is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), 'an activity which RICO was designed to deter'." *Id.* When one is injured in his business or property the limitations period should begin to run on that day. If the injury was not by reason of a pattern of racketeering activity or of an overt act pursuant to a conspiracy to carry out such a pattern, then it could not have been by reason of a violation of § 1962.

Those courts which choose not to apply the general rule have uniformly ignored the critical differences between civil and criminal conspiracies, which differences dictate separate rules as to when the statute of limitations begin to run. The court in *Bankers*, and other courts reaching the same result, have ignored the distinction by relying on *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd mem.* 578 F.2d 1371 (2nd Cir.), *cert. denied*, 439 U.S. 801 (1978), and other criminal conspiracy cases. In *Field*, the court was concerned in part with the running of the limitations period on an indictment charging a criminal RICO conspiracy. According to *Field*, in a criminal conspiracy, the statute of limitations begins to run anew on the commission of each overt act. *Id.* at 59. This is because, as long as the conspiracy continues, the conspirators become more and more likely to commit an unlawful act. Society in general is deemed injured by the conspiracy even if no substantive laws have been violated. It is the *mens rea* that is thought to injure society. Society retains its right to punish those involved in the conspiracy so long as the

conspiracy continues to make itself manifest through overt acts.

In a civil conspiracy, the injured party and the nature of the injury are different from the societal interest in the criminal statutes. "In the civil case, actual injury is the focal point, not the illegal agreement per se, as is true in the criminal context." *Wells v. Rockefeller*, 728 F.2d 209, 217 (3rd Cir. 1984).[8] The civil conspiracy cause of action is not designed to punish the *mens rea* of the conspirators, but to provide a remedy for the injuries suffered by their acts. *Compton v. Ide*, 732 F.2d 1429, 1433. "Mere continuance of a conspiracy beyond the date when injury or damage occurs does not extend the statute of limitations." *Id.* at 1432. For these reasons, the statute of limitations on civil RICO claims should begin to run on the date of injury, and there is no reason to create an exception to the general rule or to analogize civil RICO claims to criminal conspiracy claims.

Cases such as *Bankers* and *County of Cook* attempt to characterize civil RICO violations as continuing violations or conspiracies in order to justify the rule that the period runs from the last predicate or overt act upon which the plaintiff relies. *Bankers*, for example, relies upon employment discrimination cases to provide the model of the continuing conspiracy exception. It cites *Held v. Gulf Oil Co.*, 684 F.2d 427 (6th Cir. 1982), for the proposition that so long as the last act evidencing the continuing violation falls within the limitation period, courts will provide relief

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[8]In *Wells*, the Third Circuit held that the statute of limitations began to run from the date of injury even where a continuing conspiracy is alleged. It noted that *White v. Bloom*, 621 F.2d 276 (8th Cir. 1980) had held that the statute would run from the last act of a continuing conspiracy. *White v. Bloom*, however, relied on state law contrary to *Rawlings v. Ray*, *supra*.

for all related acts, even those time-barred. *Held*, of course, does not stand for this proposition. What *Held* did was to permit a plaintiff, who claimed she was constructively discharged, to use proof of discriminatory acts committed prior to the limitations period to prove the existence of a continuing violation which caused her to terminate her employment; it did not permit recovery for pre-limitation period injuries. *See, Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) (stating at page 338: "In the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.")[9]

Statute of limitation periods are designed to protect the integrity of the judicial system. "Just determinations of fact can not be made when, because of the passage of time, the memories of witnesses have faded and evidence is lost." *Wilson*, supra. at 1944. This may mean that those accused of wrongdoing may not be held accountable, if the injured party sleeps on his rights. However, the system benefits, and "even wrongdoers are entitled to assume that their sins may be forgotten." *Id.*

If this Court finds that the applicable Pennsylvania statute of limitations period is the two-year period for injury to business, then the present RICO claim for recovery for Malley-Duff's termination injury is time-barred.

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[9]*County of Cook cites Newman v. Wanland*, No. 85C 2265 (N.D. Ill. Mar. 7, 1986), which relied upon a discredited court of appeals decision, namely *Baker v. F&F Investment*, 420 F.2d 1191 (7th Cir. 1970), which followed *Hazeltine Research, Inc. v. Zenith Radio Corp.*, 418 4.2d 21 (7th Cir. 1969), which was reversed by *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

Malley-Duff's termination injury occurred on February 11, 1978. No RICO cause of action was filed within two years of that date.

IV. Even if this Court should hold that the statute of limitations did not start to run until Malley-Duff had knowledge or should have had knowledge of a second predicate act that it believed formed a pattern of racketeering activity, its claim is barred by the applicable two-year statute of limitations.

The RICO Complaint in this action was filed on March 20, 1981. Malley-Duff contends that its alleged termination and law suit injuries were not the product of sporadic activity, but part of a planned course of conduct.

> [T]he instant case does not involve sporadic activity. It involves a well orchestrated scheme—or pattern of activities—to fraudulently take over Crown Life's agencies throughout the northeast, to exploit those agencies for the benefit of the individual defendants and to conceal their activities from discovery.

Malley-Duff Supplemental Brief to the Third Circuit, p. 6.

Malley-Duff was clearly aware of the alleged mail fraud in August of 1977 and its termination in February of 1978. The question arises, when did it learn of the alleged conspiracy or of a second predicate act or acts sufficient to constitute a pattern of racketeering activity?

As stated in Argument II above, it knew that Agency Holding had become the Crown Life general agent in Chicago and in Cleveland at least as early as February 1978.

Malley-Duff became aware of the shredding of documents at least as early as November 21, 1978. (Deposition

of Diane Pariano, November 21, 1978). Her deposition confirms Malley-Duff had knowledge of an alleged second predicate act which it has alleged was an obstruction of justice and which caused it injury. In fact, Mrs. Kenneth Backhus testified in her deposition of December 19, 1978, that she had observed the shredding of documents in the Chicago office of Agency Holding. In addition, Malley-Duff was also aware in December of 1978 of the alleged obstruction of justice involving the hiding of secretary/receptionist Miss Marie Beemsterboer from a United States Marshal—a third predicate act upon which Malley-Duff relies in its RICO claims.

Malley-Duff has also alleged that a defendant caused Diana Pariano to perjure herself in her November, 1978, deposition and these allegations are based on information Malley-Duff possessed prior to her deposition or, at the latest, when Mrs. Backhus was deposed in December, 1978.

Accordingly, Malley-Duff knew more than two years before the Complaint was filed of at least four of the alleged predicate acts upon which it relied in its Complaint to establish a pattern of racketeering. Its RICO claims are barred at least as to its claim of injury due to the termination of its general agency contract and the other alleged acts of racketeering activity of which it had knowledge or should have had knowledge before March 19, 1979.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court adopt the rule that the state statute of limitations applicable to injury to business or property be utilized in all civil RICO claims, that it hold that causes of action for RICO claims accrue at the time of injury and

that it reverse the Third Circuit Court of Appeals in this case and affirm the decision of the District Court as to any injuries to the Respondent which occurred on or before March 19, 1979.

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Supreme Court, U.S.
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Nos. 86-497 and 86-531

In the Supreme Court of the United States

October Term, 1986

AGENCY HOLDING CORPORATION, *et al.*,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

CROWN LIFE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Brief For Petitioners In No. 86-497

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QUESTIONS PRESENTED

1. How should the courts choose statutes of limitations for use with civil RICO claims? Should such claims be characterized in the same way or should they be evaluated differently depending on the nature of the RICO predicate racketeering act or acts presented by each claim?

2. When do limitations periods begin to run on civil RICO claims?

LIST OF ALL PARTIES

The parties in the Court of Appeals for the Third Circuit were:

Malley-Duff & Associates, Inc.

Appellant: plaintiff in the district court

Crown Life Insurance Company
Agency Holding Corporation, an Illinois corporation
Agency Holding Corporation, an Ohio corporation
Clarke Burton Lloyd
Kerry Patrick Craig
Diane Pariano
Erhman Ratini Oglevee & Craig, Inc.
Robert Oglevee

Appellees: defendants in the district court

Petitioners in No. 86-497 understand that Crown and Lloyd, petitioners in No. 86-531, will file a separate brief.

LISTING UNDER SUPREME COURT RULE 28.1

Set forth below is a listing of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioners Agency Holding Corporation (Illinois), Agency Holding Corporation (Ohio), and Ehrman Ratini Oglevee & Craig, Inc.:

Agency Management, Inc.
American Assurance Marketers, Inc.
Crown Associates of Arizona, Inc.
Crown Associates of Colorado, Inc.
Crown Associates of Minneapolis, Inc.
Kerry P. Craig & Associates, Inc.
Craig Associates, Inc.
R. C. Oglevee & Associates, Inc.

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Nos. 86-497 and 86-531

In the Supreme Court of the United States

October Term, 1986

AGENCY HOLDING CORPORATION, *et al.*,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

CROWN LIFE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Brief For Petitioners In No. 86-497

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 792 F.2d 341 (1986) and appears in the Joint Appendix beginning at page 70. The Opinion of the district court, not yet reported, appears in the Joint Appendix beginning at page 56.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 30, 1986. Petitioners' timely application for rehearing was denied on July 1, 1986.

Petitioners filed their Petition for Writ of Certiorari on September 26, 1986. The Petition was granted by Order of this Court on December 1, 1986.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The sections of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1982) which this case involves are: §§ 1961(1), (4) and (5); § 1962; and § 1964(c).

The sections of Pennsylvania's statutes of limitations which this case involves are: 42 Pa. Cons. Stat Ann. § 5524 and § 5527 (Purdon 1981).

The full text of each of these sections is set forth in Appendix D to the Petition for Certiorari filed in No. 86-497.

STATEMENT OF THE CASE

From 1967 to February 13, 1978, Malley-Duff and Associates, Inc. was a general agent of Crown Life Insurance Company in Pittsburgh, Pennsylvania. Crown terminated Malley-Duff's agency contract as of February 13, 1978, pursuant to a 30-day termination clause in the contract. (J.A. 6, 23).

After proceeding unsuccessfully in state court for injunctive relief, Malley-Duff in April 1978 filed suit in federal district court in the Western District of Pennsylvania (hereinafter "MD-I"), against defendants Crown, Lloyd, Craig, Agency Holding Company (Illinois) and Agency Holding Company (Ohio). (Complaint, Civil Action No. 78-373 W.D. Pa.). Malley-Duff alleged federal antitrust law violations and various common law claims, including breach of contract, tortious interference and common law conspiracy to tortiously interfere. Malley-Duff claimed damages resulting from the termination of its contract. (Complaint, Civil Action No. 78-373, ¶¶ 17-60).

On March 20, 1981, while MD-I was in pretrial discovery, Malley-Duff filed the instant suit (hereinafter "MD-II") alleging *inter alia* four civil RICO counts. (J.A. 7-16). The four RICO counts in the MD-II complaint track the four substantive subsections of 18 U.S.C. §§ 1962(a), (b), (c), and (d). All four counts are based on allegations that defendants "associated themselves as an enterprise . . . to acquire, take over or eliminate various Crown agencies that had lucrative territories in the United States." (J.A. 7). Defendants acquired various Crown agencies by "false and fraudulent means and pretenses," (J.A. 8) and committed multiple violations of 18 U.S.C. §§ 1341, 1342 and 1503 (mail and wire fraud and obstructions of

justice) (J.A. 7-10). Defendants imposed a "bogus quota" on Malley-Duff, which was "impossible to meet." (J.A. 8). When Malley-Duff failed to meet the quota, defendants "seized its business and goodwill without compensation." (J.A. 9). Plaintiff alleged injury to its business or property from the termination of its agency contract and from interference with its established customers. (J.A. 11-16).

In MD-II, Malley-Duff claimed damages (1) resulting from its termination and (2) resulting from expenses and delays from alleged obstructions of justice in MD-I. (J.A. 9-10). The district court and the court of appeals chose to treat each of these claims separately. (J.A. 57, 74-75).

MD-I and MD-II were consolidated on November 2, 1981 and discovery proceeded jointly on both cases.

On July 29, 1982, defendants filed Motions for Summary Judgment in both MD-I and MD-II. (J.A. 28).

On January 10, 1983, the district court severed MD-II from the trial of MD-I.

On March 8, 1983, MD-I went to trial for five weeks before a jury. Defendants won a directed verdict on Malley-Duff's antitrust claims at the close of Malley-Duff's case. The trial proceeded on Malley-Duff's tortious interference and common law civil conspiracy claims. The jury returned verdicts (subsequently held to be inconsistent by the court of appeals; *Malley-Duff & Associates, Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 145 (1984), *cert. denied*, 469 U.S. 1072 (1984)) finding that defendants were not liable for tortious interference but that Crown, Lloyd and Craig (but not the Agency Holding Company defendants) were liable for civil conspiracy to tortiously interfere.

Defendants and Malley-Duff appealed MD-I. The appeals were argued on March 5, 1984, and decided on May 7, 1984. In the meantime, on March 20, 1984, the district court granted defendants' Motions for Summary Judgment in MD-II on all counts. (J.A. 56). The district court held that the appropriate Pennsylvania limitations period was the two-year period contained in 42 Pa. Cons. Stat. Ann. § 5524(3) which covers actions for "taking, detaining or injuring personal property." (J.A. 58-60). The court then applied this limitations period to Malley-Duff's RICO claims. It held that the RICO claims based on Malley-Duff's termination on February 13, 1978 were time-barred after February 13, 1980—over a year before Malley-Duff filed MD-II. (J.A. 59-60).

The district court also dismissed plaintiff's RICO claims based on obstruction of justice for reasons not involving the statute of limitations. It held that interference with a lawsuit did not constitute an injury to business or property within the meaning of RICO. (J.A. 62).

Malley-Duff appealed MD-II. The appeals were argued before the Third Circuit Court of Appeals on November 19, 1985. On May 30, 1986, the circuit court reversed the district court and remanded. The circuit court held that, in borrowing limitations periods for civil RICO claims, the courts should apply uniformly in each state the one most appropriate state statute of limitations for all civil RICO claims. (J.A. 86). The court then selected the Pennsylvania six-year residual "catch-all" statute of limitations period for application to civil RICO claims arising in Pennsylvania and held that Malley-Duff's termination damages claims were not time-barred. (J.A. 93-96). The court also reinstated plaintiff's obstruction of justice claims holding that they did constitute an injury to "business or

property." (J.A. 99). Because it selected a six year limitations period, the Third Circuit did not reach the issue of when the limitations period began to run. (J.A. 77).

Timely petitions for rehearing *en banc* were filed by all defendants. They were denied on July 1, 1986. (J.A. 104-105).

On September 26, 1986, Petitioners filed a Petition for Writ of Certiorari with this Court. The Petition was granted on December 1, 1986.

SUMMARY OF ARGUMENT

Civil RICO provides enhanced civil remedies against persons who in the course of acquiring or maintaining an interest in, or conducting an enterprise through a pattern of racketeering activity injure plaintiff directly or indirectly by one or more of the racketeering activities forming the pattern.

The essence of civil RICO is that it provides its enhanced civil remedies only for injuries to business or property and only for injuries caused by a wide variety of specified "predicate" state and federal crimes.

Civil RICO contains no statute of limitations. The procedure and factors to consider when choosing a statute of limitations set forth in *Wilson v. Garcia*, 471 U.S. 261 (1985), when applied to civil RICO, require that a uniform approach be taken to characterizing the essence of RICO. The essence of civil RICO suggests that it is most analogous to tort actions for injuries to business or property. In Pennsylvania a two-year statute of limitations applies to such injuries.

Sedima, S.P.R.L. v. Imrex, ____ U.S. ____, 105 S. Ct. 3275 (1985), made it clear that a plaintiff need not causally trace his injury to a "confluence" of RICO's elements; he need not suffer a "racketeering injury" to recover civil RICO's enhanced remedies. Since *Sedima* a plaintiff need only trace his injury to a predicate racketeering act or to an overt act of a RICO conspiracy. Prior to *Sedima* those courts which read a "confluence," "racketeering injury" requirement into civil RICO imposed on RICO plaintiffs the burden of tracing their injury to continuous activity by defendants in the form of a pattern of racketeering activity. Since *Sedima* the element of continuity in a civil RICO

action is similar to the element of continuity in a continuing civil antitrust conspiracy action.

The usual federal accrual rules which apply to continuing civil antitrust conspiracies should be applied to civil RICO actions. These rules provide that a cause of action accrues and the statute of limitations begins to run when a defendant commits an act that injures a plaintiff's business. (*See infra* p. 30). Plaintiff's civil RICO termination claim is barred by the application of this rule and Pennsylvania's two-year statute of limitations.

ARGUMENT

I. CIVIL RICO PROVIDES ENHANCED CIVIL REMEDIES AGAINST PERSONS, WHO, IN THE COURSE OF ACQUIRING OR MAINTAINING AN INTEREST IN OR CONDUCTING AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY, INJURE PLAINTIFF DIRECTLY OR INDIRECTLY BY ONE OR MORE OF THE RACKETEERING ACTIVITIES FORMING THE PATTERN. THE ESSENCE OF CIVIL RICO IS THAT IT PROVIDES ITS CIVIL REMEDIES ONLY FOR INJURIES TO BUSINESS OR PROPERTY AND ONLY FOR INJURIES CAUSED BY A WIDE VARIETY OF SPECIFIED "PREDICATE" STATE AND FEDERAL CRIMES.

Answering each of the questions presented for review requires an analysis of the structure and essence of civil RICO as it has been construed and interpreted in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, ____ U.S. ____, 105 S. Ct. 3275 (1985).

Civil RICO provides enhanced civil remedies against persons who acquire or maintain an interest in, or conduct an enterprise through a pattern of racketeering activity. 18 U.S.C. §§ 1962 and 1964(c).

Prior to *Sedima*, the lower courts were divided over what causal relationship was required in civil RICO between the elements of the conduct made "unlawful" and prohibited by § 1962, and plaintiff's injuries.

A number of the lower courts, including the Second Circuit in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482 (1984), had held that a plaintiff suing under

§§ 1962(a)-(c) must causally trace his injury to a "confluence," 105 S. Ct. at 3297 (Marshall, J., dissenting), of the elements of one of these subsections in order to recover. According to this interpretation of § 1964(c), only if a plaintiff could prove a "racketeering injury," 105 S. Ct. at 3285, that is, an injury traceable to a "confluence" of the elements of a § 1962(a), (b) or (c) offense, could plaintiff recover the enhanced civil remedies provided by § 1964(c).

Two other causation requirements could have been read into § 1964(c). The courts could have required that a plaintiff trace his injury to a "pattern of racketeering activity," one of the elements of the conduct made unlawful by §§ 1962(a)-(c), or they could have required "merely" that plaintiff trace his injury to "the commission of a [single] predicate act." 105 S. Ct. at 3297 (Marshall, J., dissenting).[1]

In *Sedima* the Court rejected the "confluence" or "racketeering injury" interpretation of § 1964(c). The four dissenters in *Sedima* accepted it. Since *Sedima*, it is clear that a plaintiff does not need to prove that his injury was caused by a "confluence" of the elements of a § 1962 violation; he need not prove a "racketeering injury."

Writing for the *Sedima* majority, Justice White stated:

> If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions [§§ 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, then plaintiff has a claim under § 1964(c). There is no room in the

[1]Note that this causation problem is not presented by RICO's criminal sections because no causal link to injury is required in a RICO criminal prosecution. A prosecutor need only prove the elements of a § 1962 violation to convict.

> statutory language for an additional, amorphous 'racketeering injury' requirement.

105 S. Ct. at 3285 (footnote omitted).

> [T]he statute requires no more than this. Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern. . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

105 S. Ct. at 3286 (footnote omitted). While this language could be read to mean that plaintiff must trace its injury to a pattern of racketeering *activities*—plural—we believe that the majority did not intend this.[2] We believe that the Court meant to allow recovery for injury from one predicate act, as long as plaintiff could prove that this act was part of a pattern of racketeering activity through which defendants committed a § 1962(a), (b) or (c) offense. This belief is supported by the *Sedima* dissent's interpretation of the majority opinion, *see* 105 S. Ct. at 3297, and by the

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[2]At least one district court has explicitly read *Sedima* as requiring plaintiff to trace its injury to a pattern of racketeering activities. *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, No. 84-4056 (D.N.J. filed Dec. 2, 1986) (available on LEXIS, Genfed Library, Dist. file). In its brief before the Third Circuit, plaintiff took the position that when its agency contract was terminated, no pattern of racketeering activity had been committed by defendants. (Brief for Appellant, 32-34). If *Sedima* is read as requiring plaintiff to trace his injury to a pattern of racketeering activity rather than merely to a single racketeering act, and plaintiff's position remains as stated in its Third Circuit brief, plaintiff has no cause of action for its termination under RICO §§ 1962(a)-(c). Plaintiff might still have a § 1962(d) RICO conspiracy cause of action provided it can prove that defendants had conspired, as of the time of plaintiff's termination, to engage in the conduct §§ 1962(a), (b) or (c) makes unlawful.

singular, not plural, language used by Justice White in footnote 15.[3]

> Under the dissent's reading of the statute, the harm proximately caused by the forbidden conduct is not compensable, but that ultimately and indirectly flowing therefrom is. We reject this topsy-turvy approach, finding no warrant in the language or the history of the statute for denying recovery thereunder to 'the direct victims of the [racketeering] activity.' . . .

105 S. Ct. at 3286 n. 15 (brackets in original).

Civil RICO, as it has been construed and interpreted in *Sedima*, in effect describes what one must do to be subject to RICO's new civil remedies. Civil RICO is not a substantive statute; it merely adds enhanced civil remedies for already existing predicate act state and federal crimes. *See United States v. Turkette*, 452 U.S. 576, 586 (1981) and Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009, 1021 n. 71 (1980) [hereinafter referred to as RICO: Basic Concepts].[4]

The Justices who dissented in *Sedima* read § 1962 differently. They interpreted §§ 1962(a)-(c) as stating the

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[3]Footnote 15 also suggests that *Sedima* allows recovery for indirect "competitive" injuries and "racketeering injuries" in addition to direct injuries "from the commission of a predicate act." 105 S. Ct. at 3286 n. 15.

[4]G. Robert Blakey is Professor of Law and Director of the Notre Dame Institute on Organized Crime, Notre Dame Law School. Professor Blakey was the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures in 1969-1970, when the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970), was passed. Brian Gettings was Counsel and Director of the House Republican Conference Task Force on Crime from 1967 to 1969, when legislative predecessors to the Organized Crime Control Act were drafted and first considered.

elements of three new substantive federal civil wrongs and would have required a plaintiff to prove an injury traceable to a "confluence" of these elements—a "racketeering injury"—in order to recover. 105 S. Ct. at 3297 (Marshall, J., dissenting). The majority in *Sedima* rejected this approach and allowed recovery against defendants who violate §§ 1962(a), (b) or (c) for injuries from the predicate criminal acts themselves.

Civil RICO after *Sedima* can be helpfully analogized to those statutes that impose additional penalties on persons who are repeat offenders[5] or who use a weapon when they commit existing crimes.[6] Because such offenders are more threatening and more dangerous to society additional sanctions have been put in place for use against them. Likewise, with RICO offenders as described in RICO § 1962. If defendants engage in a pattern of racketeering activity and thereby acquire (§ 1962(a)), maintain (§ 1962(b)), or conduct (§ 1962(c)) an enterprise they are more threatening and more dangerous to society. RICO put additional sanctions in place for use against them.

RICO was designed by its drafters as an attack on organized crime:

> [I]t was the declared purpose of Congress 'to seek the eradication of organized crime in the United States . . . by establishing new penal prohibitions, and

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[5]For example, the Controlled Substances Import and Export Act, 21 U.S.C. § 962 (1981), imposes twice the imprisonment and/or fine, otherwise authorized, for the commission of a second or subsequent offense under the Act.

[6]For example, 18 U.S.C. § 2113(d) (1984), dealing with bank robbery, imposes enhanced sanctions of a $10,000 fine and/or imprisonment of twenty-five years when a person robbing or attempting to rob a bank "puts in jeopardy the life of any person by the use of a dangerous weapon or device."

4. As to the averments of paragraph 13 of the Complaint, it is admitted that, from 1967 until February 11, 1978, Plaintiff was an insurance agent licensed by the Commonwealth of Pennsylvania and, subject to the terms of such written contracts as were from time to time in effect, represented Defendant Crown as one of its general agents in the vicinity of Pittsburgh, Pennsylvania, was empowered to solicit applications for and to service policies of insurance written by the Defendant Crown, and did in fact solicit applications for and service such policies for policyholders located in Pennsylvania. Except as herein expressly admitted, the averments of said paragraph 13 are denied.

5. As to the averments of paragraph 14 of the Complaint, is is admitted that Thomas E. Malley and James A. Duff, Jr., have in part owned entities which for some time prior to February 11, 1978 acted as a general agent for Defendant Crown in the vicinity of Pittsburgh, Pennsylvania. As to the remaining averments of said paragraph 14, these Defendants are without knowledge or information sufficient to form a belief as to the truth thereof.

Second Defense (as to all six counts)

6. Beginning several years prior to Plaintiff's termination, and as a result of Plaintiff's inadequate representation of Defendant Crown in the vicinity of Pittsburgh, Pennsylvania, Defendant Crown's percentage of the insurance business done in that vicinity had become and thereafter remained lower than it was reasonable to expect.

7. In response to these disappointing results, Defendant Crown had on numerous occasions orally notified

Plaintiff that Plaintiff's performance in behalf of Defendant Crown was inadequate and demanded that Plaintiff increase its marketing efforts. However, such notices and demands did not result in any improvement; Plaintiff's performance continued to be disappointing.

8. As a result of Plaintiff's continuing poor performance, Defendant Crown by letter dated August 17, 1977, advised Plaintiff of certain levels of performance that should be met and maintained. By letter dated October 4, 1977, Defendant Crown urged Plaintiff to put forth every effort to avoid termination of the agency contract for lack of production at the beginning of 1978.

9. The general agency contract in effect between Plaintiff and Defendant Crown during 1977 provided, in pertinent part, as follows:

> 30. This Agreement may be terminated on one month's notice by either party and such notice will be deemed to have been given when a registered letter containing the notice is mailed addressed to the party entitled to notice at the party's last known address.

This was not a new provision; prior contracts included the same language.

10. Plaintiff failed to achieve the level of performance referred to in the aforesaid letters. Defendant Crown, in the exercise of its rights under the contract provision above quoted, by letter dated and mailed by registered mail on January 11, 1978, notified Plaintiff that its general agency would terminate one month thereafter.

11. The termination of Plaintiff's general agency contract was motivated, not by any of the purposes charged

in the complaint, but solely to assure that Defendant Crown would be adequately represented in the vicinity of Pittsburgh, Pennsylvania by a general agency that would make satisfactory marketing efforts. No falsity or fraud of any sort whatsoever was involved in the decision to terminate the agency relationship, nor was it part of any conspiracy.

12. Neither of these defendants has in any way affected or obstructed the administration of justice, nor engaged in any attempt to do so, nor has either of these defendants engaged in any conspiracy to do so.

13. The conduct of these defendants was not such as to violate 18 U.S.C. § 1341, 18 U.S.C. § 1342, 18 U.S.C. § 1503, 42 U.S.C. § 1985, 42 U.S.C. § 1986, or any one or more of them, and hence no recovery can be had under any subsection of 18 U.S.C. § 1962 or under 42 U.S.C. § 1988.

Third Defense (as to all six counts)

14. The Complaint fails to state a claim under which relief can be granted.

WHEREFORE defendants Crown life Insurance Company and Clarke Burton Lloyd ask that judgment be entered in their favor and against the Plaintiff on all six counts in the complaint, and that they be allowed their costs.

/s/ Alexander Black
/s/ Ramona J. Rokoski
/s/ Robt. W. Brown
/s/ Buchanan Ingersoll Rodewald
Kyle & Buerger
Attorneys for Crown Life Insurance Company and Clarke Burton Lloyd, Defendants

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC., a corporation,

Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY, a corporation, et al.,

Defendants.

AMENDMENT TO ANSWER

Defendants Crown Life Insurance Company and Clarke Burton Lloyd amend their Answer in the above titled case as follows:

FOURTH DEFENSE (as to all six counts)

15. Counts one through six of the Complaint are barred by the applicable statute of limitations.

Dated: July 9, 1982

BUCHANAN, INGERSOLL, RODEWALD, KYLE & BUERGER, P.C.

By: /s/ Alexander Black

/s/ Ramona J. Rokoski

/s/ Robert W. Brown
Attorneys for Defendants Crown Life Insurance Company and Clarke Burton Lloyd

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC., a corporation,
Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY,
a corporation, et al.,
Defendants.

AMENDED ANSWER

I. Answer of Defendants, Agency Holding Corporation, (Illinois), Agency Holding Corporation (Ohio), Kerry Patrick Craig, Diane Pariano, Ehrman, Ratini, Oglevee & Craig, Inc. and Robert Oglevee

First Defense As To All Six Counts

1. Defendants admit the allegations in the following paragraphs of the complaint: 2, 3, 4, 5, 6, 7, 8, 9, 12 and 17; except that the present address of: (a) Agency Holding Corporation (Illinois) is Room 1760, 208 LaSalle Street; (b) Agency Holding Corporation (Ohio) is Suite 1203, No. 1, Erieview Plaza; (c) Kerry Patrick Craig is 387 Sterling, Kenilworth, Illinois; (d) Diane Pariano is 387 Sterling, Kenilworth, Illinois; and (e) Ehrman, Ratini, Oglevee & Craig is Suite 2000, 309 Smithfield Street, Pittsburgh, Pennsylvania.

2. Defendants deny the allegations in the following paragraphs of the Complaint and each and every subpara-

graph and sub-paragraph thereof: 10, 11, 16, 18, 19, 20, 21, 22, 23, 25, 26, 28, 29, 31, 32, 34, 35, 36, 37, 38, 39, 40, 42 and 43.

3. Defendants are without knowledge or information sufficient to form a belief as to the allegations in the following paragraphs of the Complaint: 1, 13, 14 and 15.

4. Defendants' answers to the paragraphs of the Complaint incorporated in paragraphs 24, 27, 30, 33 and 41 of the Complaint are set forth in paragraphs 1, 2 and 3 of this Amended Answer.

Second Defense As To All Six Counts

5. The Complaint fails to state a claim upon which relief can be granted.

Third Defense As To All Six Counts

6. Counts one through six are barred by applicable one or two year statutes of limitations.

WHEREFORE, Defendants ask that judgment be entered in their favor and against Plaintiff on all six counts in the Complaint, and that they be awarded attorneys' fees and costs.

Dated:

THORP, REED & ARMSTRONG

By: /s/ Charles Weiss

/s/ John H. Bingler, Jr.

/s/ Glenn E. Bost, II

Attorneys for Defendants, Agency Holding Corporation, (Illinois), Agency Holding Corporation, (Ohio), Kerry Patrick Craig, Diane Pariano Ehrman, Ratini, Oglevee & Craig, Inc. and Robert Oglevee

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC.,
a corporation,

Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY,
a corporation, et al.,

Defendants.

NOTICE
and
MOTION FOR SUMMARY JUDGMENT

Please take Notice that the following Motion for Summary Judgment will be filed with the Clerk of Court on July 29, 1982.

THORP, REED & ARMSTRONG

By: /s/ JOHN H. BINGLER, JR.
John H. Bingler, Jr.

By: /s/ GLENN E. BOST, II
Glenn E. Bost, II

Attorneys for Defendants,
Agency Holding Corporation, an
Illinois Corporation, Agency
Holding Corporation, an Ohio
Corporation, Kerry Patrick
Craig, Diane Pariano, Ehrman
Ratini Oglevee & Craig, Inc.,
and Robert Oglevee

MOTION FOR SUMMARY JUDGMENT

Agency Holding Corporation (Illinois), Agency Holding Corporation (Ohio), Ehrman Ratini Oglevee & Craig, Kerry Patrick Craig, Robert Oglevee and Diane Pariano (hereinafter the "Agency defendants"), by their attorneys move the Court for summary judgment. This motion applies only to plaintiff's 1981 Complaint. The Agency defendants adopt by reference the Motion for Summary Judgment filed by defendants Crown Life Insurance Company (hereinafter "Crown") and Clarke Burton Lloyd applicable to Plaintiff's 1978 Complaint.

Preliminary Statement

Background

On or about January 11, 1978, Crown notified plaintiff that its General Agency Agreement would be terminated, effective in one month. (Craig Affidavit attached hereto para. 7 and Exhibit B thereto.) On February 10, 1978, plaintiff sued in state court for preliminary and permanent injunctions against the termination. When plaintiff's request for a preliminary injunction was denied plaintiff abandoned its state court action and in April 1978, sued in this Court.

In this 1978 suit plaintiff's Complaint alleged antitrust violations, tortious interference, breach of contract, etc., and sought an injunction against the termination and damages for injuries resulting from the termination. Defendants' Answers alleged that the termination was lawful and pursuant to the General Agency Agreement and was prompted by plaintiff's inadequate performance and failure to meet a reasonable production standard for 1977

(Answer of defendants Crown & Lloyd—Third Defense), which was lower than production achieved by plaintiff in a number of years prior to 1977 (Craig Affidavit para. 3; February 1978 Common Pleas Hearing transcript attached hereto at p. 125 and Exhibit A thereto). Plaintiff's Complaint had alleged that the production standard was unrealistic and unreachable.

Almost three years later, in March, 1981, plaintiff again sued in this Court, alleging RICO and Civil Rights claims and a pendent common law conspiracy claim.

Plaintiff's 1981 Complaint attempts to support its RICO claim by alleging, for the first time, that Crown's 1977 production standard was fraudulent and therefore constituted mail and wire frauds (RICO predicate offenses). It also alleges that plaintiff was defrauded of vested renewal commissions to which it was entitled. There is no evidence to support the allegation that plaintiff lost any vested renewal commissions (Craig Affidavit para. 8).

Plaintiff's 1981 Complaint attempts to support both its RICO and Civil Rights claims by alleging that during the discovery phase of the 1978 suit defendants engaged in various obstructions of justice (RICO and Civil Rights Act violations). The 1981 Complaint alleges that these obstructions, which occurred well after the termination, injured plaintiff by causing it "great expenses, delays and inconvenience [in its 1978 case and by denying plaintiff] Relevant and material evidence [in its 1978 case]."

In 1979, plaintiff had sought relief from the alleged obstructions of justice by way of a Motion for Sanctions filed in the 1978 suit. This Motion was voluntarily abandoned by plaintiff after the 1981 suit was filed. A four

day hearing on plaintiff's 1979 Motion for Sanctions was interrupted in June of 1979, when the then-presiding judge referred plaintiff's allegations to the U.S. Attorney for investigation. In 1981, the U.S. Attorney reported to this Court that no prosecution was contemplated.

Summary of Defendants' Arguments

Plaintiff has not been injured by any RICO or Civil Rights violations. Both RICO and the Civil Rights Act give causes of action to persons injured by activities the Acts prohibit; but plaintiff has not been injured by activities prohibited by RICO or the Civil Rights Act.

This is so because the only injury actually suffered by plaintiff was not caused by an activity prohibited by RICO or the Civil Rights Act. There is simply no casual connection between any allegedly wrongful activity of defendants and the only injury actually suffered by plaintiff for which the law might provide a remedy, namely, the termination of its General Agency Agreement in February, 1978. All of the obstructions of justice alleged in the 1981 Complaint, which, if proved, might constitute RICO and Civil Rights violations, took place after the termination and therefore could not have caused it. There is no evidence to show that a conspiracy to commit the alleged obstructions of justice antedated the termination.

The 1981 Complaint attempts to overcome this causation problem by claiming that the 1977 production standard, which caused the termination, constituted mail and wire frauds (RICO predicate offenses). Plaintiff may hope to prove that the standard was unrealistically high or unreachable, but there is no evidence that any fraud was involved. There were simply no misrepresentations.

Parenthetically, even if the production standard can somehow be tortured into a mail or wire fraud, any 1981 suit seeking recovery for the termination in 1978 is barred by the state statute of limitations applicable to civil RICO actions. This bar applies with equal force to plaintiff's common law conspiracy claim.

Plaintiff's 1981 Complaint attempts to overcome the absence of a casual connection between an activity prohibited by RICO or the Civil Rights Act and legally actionable injury to plaintiff, by alleging as injuries the "great expenses, delays and inconvenience . . . imposed upon Plaintiff in its" 1978 case, and the denial of "Relevant and material evidence" in this 1978 case (hereinafter referred to as "lawsuit injuries").

These alleged "lawsuit injuries" are simply not injuries recognized as actionable by the common law or RICO or the Civil Rights Act. The law simply does not recognize a separate cause of action for "lawsuit injuries" which could be remedied by sanctions available during a pending lawsuit. If it did, parties would thereby be afforded the option of either pursuing sanctions for the "lawsuit injuries" discovered during the pendency of a lawsuit or bringing separate common law or RICO or Civil Rights suits. Failing to pursue available sanctions could distort the outcome of a pending lawsuit. Opting to refrain from pursuing available sanctions would be the actual cause of the "lawsuit injuries" since they could have been avoided or eliminated by sanctions. Furthermore, parties to lawsuits could convert any serious discovery dispute in federal or state court into a common law conspiracy, RICO or Civil Rights suit.

In addition, RICO provides remedies only for commercial or competitive injuries, not "lawsuit injuries". The Civil Rights Act in pertinent part provides remedies only when parties or witnesses are subjected to intimidation or threats. There is no evidence of intimidation or threats in this case even though plaintiff's 1981 Complaint makes this allegation.

To recover under the Civil Rights Act a plaintiff must prove that he was personally subjected to intimidation or threats, and that defendant was motivated by a class based animus. Plaintiff's Complaint does not allege the second element, and there is no evidence to support the first.

Even if RICO provided a cause of action for "lawsuit injuries", plaintiff's claims for these injuries are barred by the one year state statute of limitations applicable to civil RICO claims. Plaintiffs cause of action arose, if at all, in 1979 and was not sued on until 1981.

If the Court grants summary judgment against plaintiff's RICO and Civil Rights claims, it should dismiss the common law conspiracy claim because of a lack of any basis for asserting pendent jurisdiction.

Finally, the court should grant summary judgment in favor of individual defendant Pariano because there is no evidence that she participated in or caused the termination of plaintiff's General Agency Agreement (Pariano Affidavit attached hereto).

1. Motion For Summary Judgment On Plaintiff's RICO Claims

1. Plaintiff filed its 1981 Complaint on March 20, 1981.

2. Counts 1 through 4 of plaintiff's Complaint assert causes of action based on section 1964(c) of the RICO statute, 18 USC § 1964(c)(1970).

3. RICO section 1964(c) gives a cause of action to "Any person injured in his business or property by reason of a violation of section 1962. . . ."

4. Plaintiff has not been injured in its business or property by any RICO violation.

5. The only injury alleged in the Complaint to have been caused by wrongful activity of the defendants, and actually suffered by plaintiff, for which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February 1978.

6. RICO does not provide a remedy or recognize as actionable injuries, the "lawful injuries" alleged in the Complaint—"expenses, delays and inconvenience . . . imposed . . . in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence . . . in [the pending 1978 suit]."

7. RICO provides a remedy only for commercial or competitive injury to "business or property."

8. There is no evidence that any RICO violation occurred prior to the termination or caused it.

9. The 1977 performance standard alleged in the complaint as a mail or wire fraud was not a fraud or a RICO violation.

10. Plaintiff's failure to meet this performance standard in 1977 caused plaintiff's termination.

11. The incidents which are alleged in the Complaint to be obstructions of justice all occurred subsequent to the termination and did not cause it.

12. Counts 1 through 4 of the Complaint are barred by the state statute of limitations applicable to private RICO actions, 42 Pa. C.S.A. § 5523(2).

13. Plaintiff's RICO actions accrued, if at all, more than one year prior to the filing of its 1981 Complaint, and are therefore barred by the applicable state statute of limitations.

14. The statute of limitations on private RICO actions runs from the last act committed as part of a pattern of racketeering activity which causes injury to a plaintiff's business or property.

15. The last act committed as part of an alleged pattern of racketeering activity which caused legally actionable injury to plaintiff's business or property was the termination of plaintiff's General Agency Agreement in February, 1978.

16. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Counts 1 through 4 of plaintiff's Complaint.

II. Plaintiff's Civil Rights Claims

17. Count 5 of plaintiff's 1981 Complaint asserts a cause of action based on section 1985 (2) of the Civil Rights Act, 42 USC § 1985 (2).

18. Section 1985 (2), in pertinent part, prohibits conspiracies

> to deter by . . . intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying . . . freely, fully, and truthfully. . . .

and gives a cause of action to anyone

> injured in his person or property . . . for the recovery of damages, occasioned by such injury . . . against any one or more of the conspirators.

19. Count 5 asserts that defendants conspired "to deter, by intimidation and threat, plaintiff and witnesses in [the pending 1978 lawsuit] from prosecuting that action and from testifying therein . . . ."

20. The only injuries asserted by plaintiff in Count 5 are the same "lawsuit injuries" claimed in the RICO counts, Counts 1-4—"expenses, delays and inconvenience . . . imposed . . . in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence . . . in [the pending 1978 suit]".

21. The Civil Rights Act does not provide a remedy or recognize as injuries the "lawsuit injuries" alleged in the Complaint.

22. The Civil Rights Act in pertinent part provides a remedy only against persons who conspire to deter any party or witness by intimidation, or threat. There is no evidence that defendants participated in such a conspiracy.

23. The Civil Rights Act in pertinent part provides a remedy only for plaintiffs who are personally subjected to

intimidation or threats. There is no evidence that plaintiff was so subjected.

24. The Civil Rights Act in pertinent part provides a remedy only where defendants were motivated by a class based animus. Plaintiff's Complaint does not allege this essential element.

25. Count 5 of the Complaint is barred by the state statute of limitations applicable to Civil Rights actions, 42 Pa. C.S.A. § 5524.

26. Plaintiff's Civil Rights action accrued, if at all, more than two years prior to the filing of its' 1981 Complaint, and is therefore barred by applicable statute of limitations.

27. The statute of limitations on Civil Rights actions runs from the last act committed as part of a conspiracy which causes injury to plaintiff.

28. The last acts committed as part of an alleged conspiracy which caused legally actionable injury to plaintiff was the termination of plaintiff's General Agency Agreement in February 1978.

29. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Count 5 of plaintiff's Complaint.

III. Plaintiff's Common Law Conspiracy Claims

30. Count 6 of plaintiff's Complaint asserts a cause of action based on the common law of conspiracy with jurisdiction allegedly based on pendent jurisdiction principles.

31. Conspiracy law gives a cause of action to persons injured by common law conspiracies.

32. Plaintiff has not been injured by any common law conspiracy.

33. The only injury alleged in the Complaint to have been caused by wrongful activity of the defendants, and actually suffered by plaintiff, for which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February, 1978.

34. The common law of conspiracy does not provide a remedy or recognize as actionable injuries, the "lawsuit injuries" alleged in the Complaint—"expenses, delays and inconvenience . . . imposed . . . in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence . . . in [the pending 1978 suit]."

35. There is no evidence that any common law conspiracy existed prior to the termination or caused it.

36. The 1977 performance standard alleged in the Complaint as a fraud was not a fraud.

37. Plaintiff's failure to meet this performance standard in 1977 caused plaintiff's termination.

38. The obstructions of justice alleged in the Complaint all occurred subsequent to the termination and did not cause it.

39. Count 6 of the Complaint is barred by the statute of limitations applicable to common law conspiracy actions, 42 Pa. C.S.A. § 5524.

40. Plaintiff's common law conspiracy action accrued, if at all, more than two years prior to the filing of its 1981

Complaint and, therefore, is barred by the applicable statute of limitations.

41. The statute of limitations on common law conspiracy actions runs from the last act allegedly committed as part of a common law conspiracy which causes injury to plaintiff.

42. The last act committed as part of an alleged common law conspiracy which caused legally actionable injury to plaintiff was the termination of plaintiff's General Agency contract in February, 1978.

43. Because summary judgment against the federal law claims in this Complaint should be granted, no basis exists for the continued assertion of pendent jurisdiction. Count 6 should be dismissed.

44. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Count 6 of plaintiff's Complaint.

IV. Plaintiff's Claims Against Diane Pariano

45. All six counts of plaintiff's Complaint assert claims against Diane Pariano.

46. Diane Pariano was not named as a defendant in plaintiff's 1978 suit and is named only once in plaintiff's 1981 complaint.

47. Diane Pariano did not participate in any way in any actions which led to the termination of plaintiff's General Agency Contract. (Pariano Affidavit attached hereto).

48. As of the date of plaintiff's termination in February, 1978, Diano Pariano was a 19 or 20 year old secretary

in a one-secretary office operated in Cleveland by Agency Holding Corporation (Ohio). She had held that position for approximately six months. Prior to that she attended college for two years, and was not associated with Agency Holding Corporation (Ohio) in any way. As of February, 1978 she was not associated with Agency Holding Corporation (Illinois) or Ehrman Ratini Oglevee & Craig in any way.

49. No causal link exists between any act or agreement of Diane Pariano and legally actionable injury alleged by plaintiff.

50. The only injury alleged in the Complaint to have been caused by the wrongful activity of the defendants for which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February, 1978.

51. The law does not provide a remedy or recognize as injuries, the "lawsuit injuries" alleged in the Complaint—"expenses, delays and inconvenience . . . imposed . . . in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence . . . in [the pending 1978 suit]."

52. There are no genuine issues of material fact and Diane Pariano is entitled to judgment as a matter of law on Counts 1 through 6 of plaintiff's Complaint.

Dated: July 29, 1982

THORP, REED & ARMSTRONG

/s/ John H. Bingler, Jr.
John H. Bingler, Jr.

/s/ Glenn E. Bost, II
Glenn E. Bost, II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC.,
a corporation,
Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY,
a corporation, et al.,
Defendants.

ATTACHMENTS TO
MOTION FOR SUMMARY JUDGMENT

Affidavit of Kerry Patrick Craig ..... A

Affidavit of Robert C. Oglevee ..... B

Affidavit of Diane Pariano Craig C

Transcript before the Honorable
John D. Flaherty, Jr. J.
(Court of Common Pleas of
Allegheny County—February 15 and 16, 1978) ..... D

(Testimony omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC., a corporation,
Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY,
a corporation, et al.,
Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

Kerry Patrick Craig, having been sworn says:

1. I am the President and sole shareholder of Agency Holding Company (Illinois), the General Agency for Crown Life Insurance Company ("Crown") for the State of Illinois. I have been President of Agency Holding Company (Illinois) since September, 1977. Prior to becoming President of Agency Holding Company (Illinois), I was an employee in the home office of Crown Life Insurance Company ("Crown") in Toronto. My immediate supervisor at Crown was Art Thomas, an Agency Vice President, responsible for certain of the General Agencies in the United States inclding the Pittsburgh General Agency of Malley-Duff & Associates, Inc. ("Malley-Duff"). Mr. Thomas' immediate supervisor was Clarke

Lloyd, the Senior Agency Vice President of Crown for the United States. I am familiar with the facts set forth in this affidavit, which I make in support of Denfendants' Motion for Summary Judgment.

2. In 1977, I was employed as an Agency Supervisor in Crown's Agency Department. In this capacity, I had occasion to periodically visit the Malley-Duff General Agency in Pittsburgh. In early August 1977, Clarke Lloyd and I met with Thomas Malley and James Duff, the owners of Malley-Duff in Pittsburgh in early August, 1977 concerning the inadequate sales production performance of Malley-Duff and the imposition on Malley-Duff of a sales production standard for 1977. I also became familiar with the reasons for the imposition of the standard and the manner in which it was imposed. It was discussed with Messrs. Malley and Duff at the August 1977 meeting in Pittsburgh and was officially communicated to them by letter from Clarke Lloyd dated August 19, 1977. A copy is attached as "Exhibit A". The production standard called for a sales level of $7.5 million "Ordinary Net Paid". The Malley-Duff sales production had not been satisfactory for a number of years. Messrs. Malley and Duff had been told many times about this. The imposition of a production standard was a last resort. The August 1977 meeting was prompted by the January-June sales production figures of Malley-Duff which showed that Malley-Duff's performance was continuing to be unsatisfactory.

3. The production standard imposed on Malley-Duff for the year 1977 was lower than the production achieved by Malley-Duff in the years 1970, 1971, 1972 and 1975.

4. Crown had been setting sales production standards for many years for General Agencies who were not doing an adequate job in Crown's view. This gave the General Agencies and Crown a standard of performance Crown would find acceptable. A General Agency would be told it needed to achieve a certain amount of sales production or Crown would have to find someone else to handle the market. The standard is set at a certain percentage of the total market in the General Agency's geographic area.

5. On October 4, 1977, Clarke Lloyd again wrote to Messrs. Malley and Duff and urged them "to put forth every effort to avoid termination of [their] contract for lack of production at the beginning of 1978." This letter was prompted by a review of Malley-Duff's sales production figures for January-September, 1977 which showed that Malley-Duff wasn't doing anything in the marketplace.

6. Malley-Duff operated as General Agency of Crown under General Agency Agreements amended and entered into periodically as products or commission rates were changed. Paragraph 30 of these Agreements provided:

> This Agreement may be terminated on one month's notice by either party and such notice will be deemed to have been given when a registered letter containing the notice is mailed addressed to the party entitled to the notice at the party's last known address.

7. When Malley-Duff failed to meet the production standard set forth in the August 19, 1977 letter, Crown exercised its right under paragraph 30 and terminated Malley-Duff on one month's notice by letter dated January 11, 1978 effective February 10, 1978. A copy of this

letter is attached as "Exhibit B". Malley-Duff produced in 1977 approximately $5.5 million in "Ordinary Net Paid".

8. Even after termination, Malley-Duff was entitled under its agreement with Crown to receive vested renewal commissions on premiums paid on policies solicited by Malley-Duff prior to termination. Since termination, the renewal commissions to which Malley-Duff is entitled have been paid to Malley-Duff. None have been transferred from Malley-Duff to any defendant.

9. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ Kerry Patrick Craig

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ Arthur R. O'Brien
Notary Public

My Commission Expires:
October 28, 1984

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC.,

Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY, a corporation, et al.,

Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

Diane Pariano Craig, having been sworn, says:

1. I am presently Mrs. Kerry Patrick Craig. Kerry and I were married on April 16, 1982. From July 13, 1977, to June 30, 1978, I was employed as a secretary in the one secretary office of Agency Holding Corporation (Ohio) in Cleveland. I was at the time 19 and 20 years old. I am familiar with the facts set forth in this affidavit, which I make in support of Defendants' Motion For Summary Judgment.

2. After I graduated from Fairview Park High School in Fairview Park, Ohio, a suburb of Cleveland, in 1975, I attended college for two years until May 1977. During this period, I was not associated with Agency Holding Corporation (Ohio) in any way.

3. In June 1977, I began looking for a job and on July 13, 1977, was hired by Edward J. Horning to work as the secretary for Agency Holding Corporation.

4. On February 13, 1978, in Pittsburgh I learned for the first time that Malley-Duff & Associates, Inc. ("Malley-Duff") had been terminated as General Agent in Pittsburgh. I had never heard of Malley-Duff prior to that date. Robert Oglevee, my boss at Agency Holding Corporation (Ohio), asked me to help Crown organize the Malley-Duff records which had been turned over to Crown in Pittsburgh at or shortly after the termination.

5. I did not participate in any way in any acts, agreements, discussions or anything else that had to do with the setting of a production standard for Malley-Duff or the decision to terminate or the termination of Malley-Duff.

6. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ Diane Pariano Craig

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ Arthur R. O'Brien
Notary Public

My Commission Expires: October 25, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC.,
Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY,
a corporation, et al.,
Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

Robert C. Oglevee, having been sworn, says:

1. I am the President and sole shareholder of R. C. Oglevee & Assoc., Inc., the General Agency for Crown Life Insurance Company ("Crown") for the Pittsburgh area. I have been President of R. C. Oglevee & Assoc., Inc. or Secretary of its predecessor Ehrman, Ratini, Oglevee & Craig, Inc. since 1978. I am familiar with the facts set forth in this affidavit, which I make in support of Defendants' motion for Summary Judgment.

2. Even after the termination of its General Agency Agreement, Malley-Duff was entitled under its Agreement to receive vested renewal commissions on premiums paid on policies solicited through Malley-Duff prior to termi-

nation. Since termination, the renewal commissions to which Malley-Duff is entitled have been paid to Malley-Duff. None have been transferred from Malley-Duff to any defendant.

3. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ Robert C. Oglevee

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ Mary Caivano
Notary Public

My Commission Expires:

CROWN
LIFE INSURANCE COMPANY • 120 BLOOR
STREET EAST
• TORONTO • CANADA • M4W 1B8

August 19th, 1977

Messrs. Tom Malley & Jim Duff,
Malley-Duff & Associates, Inc.
Managing General Agents,
Crown Life Insurance Company,
Pittsburgh, Pennsylvania

Dear Tom and Jim:

This letter will confirm our conversation regarding the Company's attempts to increase our share of the Pittsburgh market.

As you know, the Agency was incorporated in 1954 and is one of the older agencies within the Company. It started as Young, Malley & Kekich and shortly after the original agency was formed the three partners decided to break up and Mr. Young left the business, Mr. Kekich organized his own agency and Mr. Malley organized his own agency. The Kekich Agency and the Malley Agency operated as personal producing agents for some time with unspectacular results.

In 1967 and 1968 we suggested that Mr. Malley find a partner who would help develop the business on a more productive basis and in 1968 he was joined by Mr. Duff. From 1969, 1970, 1971 and 1972 the Agency started to develop at a reasonable pace; in 1968 winning the Crown Life Cup and in 1974 winning the Director of Agencies Trophy. However, from 1972 to the current period the flow of Ordinary business has been erratic and the current position of the Agency at June, 1977 both in Ordinary and Group is extremely disappointing and the prognosis for the Agency is not encouraging, particularly on the Individual side.

The number of active producing brokers is reducing and not encouraging as far as future development is concerned. It is the oldest agency in the State of Pennsylvania as far as continuing management is concerned, but its growth has not been consistent and is certainly less now than it was in the late sixties. More importantly, in comparing the effective job that Pittsburgh East End is doing in its market, and comparing it to new agencies in Pennsylvania, it is not maintaining a preeminent position as it should both due to the age and maturity of the agency and the market that it is serving.

For example, the Erie Agency in a very small community has a much more substantial paid for business for the first six months of June, 1977, as does Philadelphia, as does Pittsburgh Center, a personal producing agency in Pittsburgh. Harrisburg, a new agency, has more than half a million paid for as does Allentown another new agency in Pennsylvania.

Obviously, Allentown, Harrisburg and Erie do not have the extra support of a Group Office in their immediate territory and there is a good deal of evidence to indicate that a Group office has a synergistic effect on the production of an agency, bringing it up to the top level.

All of the foregoing is to indicate that the Agency is not fulfilling its marketing function and as a result we have decided to take three direct steps to increase our position in the market.

We will actively seek a new general agency for Pittsburgh or, alternatively, study the market penetration potential of the Jules Ehrman Agency.

We will agree to maintain the Malley Duff Agency if the following standards are met: An Ordinary Net Paid level (including Individual Health) at December, 1977 of $7,500,000; an Ordinary and Individual Health Net Paid Score in December, 1978 of $10,000,000; an Ordinary and Individual Health Net Paid Score at the end of December, 1979 of $15,000,000 and an Ordinary and Individual Health combined Net Paid level at the end of 1980 of $20,000,000. And that this level is maintained and that the Agency because of age and market remains in the top 25% of the company's agencies serving the United States.

The above levels of performance should be maintained under the current market conditions. If the market conditions substantially change so as to effect the agency's operations over which the agency and agency personnel have no control, adjustments to these standards would be made.

I am setting these conditions forth to give you our views at this time and to clearly understand the objectives that we all have in mind.

Kind personal regards.

Sincerely,

C. B. LLOYD

C.B. Lloyd:yj

Senior Agency Vice-President
for the United States

CROWN
LIFE INSURANCE COMPANY • 120 BLOOR
STREET EAST
• TORONTO • CANADA • M4W 1B8

October 4th, 1977

Messrs. Tom Malley & Jim Duff,
Malley-Duff & Associates, Inc.
Managing General Agents,
Crown Life Insurance Company,
Pittsburgh, Pennsylvania

Dear Tom and Jim:

In reviewing the 15th September Production Summary I note that in September, 1976 the Net Settled Issues Ordinary totalled $2,692,059 and the Net Paid for the same period was $2,892,799. At September, 1977 the Net Settled Issues were $3,049,929 and the Net Paid Ordinary for the same period $3,204,500. The total Net Paid including Indi-

vidual Disability and Group at the 15th September, 1976 was $3,685,651 and the Net Paid in September, 1976 was $3,886,505. The Net Settled Issues for the same period by September 15th, 1977 had reduced to $3,273,509 and the Net Paid by September, 1977 was $3,554,250.

The potential net Paid for the current year is $147,000 and it is at this point very difficult to see how the agency can reach the reasonable quotas that we discussed previously. I strongly urge you to put forth every effort to avoid the termination of your contract for lack of production at the beginning of 1978.

Kind personal regards.

Sincerely,

C. B. Lloyd
Senior Agency Vice-President
for the United States

C.B. Lloyd:yj

c.c. Mr. M. B. Hutchison

CROWN
LIFE INSURANCE COMPANY • 120 BLOOR STREET EAST
• TORONTO • CANADA • M4W 1B8

REGISTERED

January 11th, 1978

air mail

Malley-Duff & Associates Inc.
Crown Life Insurance Company,
Liberty Building,
6101 Penn Mall
Pittsburgh, Pennsylvania 15206

Attention: Mr. James A. Duff Jr.
Mr. Thomas E. Malley

Dear Sirs:

The Company hereby gives notice of termination pursuant to Provision 30 of your General Agency Agreement which took effect September 1st, 1977.

Termination becomes effective one month from the date of mailing of this letter.

Your truly,

D. O'SULLIVAN

D. O'Sullivan,
Assistant Superintendent,
Agency Administration.

DO:lc

Malley-Duff Net Paid History

	Pittsburgh East End	West Virginia	Total Malley-Duff
1962 Malley	64,478		64,478
63	986,754		986,754
64	1,115,385		1,115,385
65 Malley & Assoc.	914,431		914,431
66	1,096,175		1,096,175
67 Malley-Duff	1,800,000		1,800,000
68	3,479,298		3,479,298
69	4,959,657	1,068,500	6,028,157
70	6,908,512	4,883,750	11,792,262
71	7,325,867	1,071,760	8,397,627
72	7,983,144	3,844,848	11,827,992
73	5,473,671	2,407,117	7,880,788
74	6,726,303	2,849,171	9,575,474
75	8,288,944 sold to	(2,468,111)	8,288,944
76	5,176,478 Dupay	(7,347,069)	5,176,478
77	5,518,155	(2,364,337)	5,518,155

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF & ASSOCIATES, INC., a corporation,

Plaintiff,

vs.

CROWN LIFE INSURANCE COMPANY, a corporation, et al.,

Defendants.

JOINDER IN MOTION FOR SUMMARY JUDGMENT AND ADOPTION OF BRIEF IN SUPPORT THEREOF

Crown Life Insurance Company and Clarke Burton Lloyd, by their attorneys, hereby adopt by reference the Motion for Summary Judgment filed in Civil Action No. 81-439 by Agency Holding Corporation (Illinois), Agency Holding Corporation (Ohio), Ehrman Ratini Oglevee & Craig, Kerry Patrick Craig, Robert Oglevee and Diane Pariano and adopt the brief filed in support thereof.

Date: July 29, 1982

/s/ Alexander Black

/s/ Ramona J. Rokoshi

/s/ Robt W. Brown

/s/ Buchanan Ingersoll Rodewald Kyle & Buerger

Attorneys for Crown Life Insurance Company and Clarke Burton Lloyd, Defendant

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY DUFF ASSOCIATES, INC.,

Plaintiff,

vs.

CROWN LIFE INSURANCE CO., a corporation, AGENCY HOLDING CORP., an Illinois corporation, AGENCY HOLDING CORP., an Ohio corporation, CLARK BURTON LLOYD, an individual, KERRY PATRICK CRAIG, an individual, DIANE PARIANO, an individual, EHRMAN RATINI OGLEVEE & CRAIG, INC., a Pennsylvania corporation, and ROBERT OGLEVEE, an individual

Defendants.

MEMORANDUM OPINION

BLOCH, District J.

Plaintiff brings this suit to recover damages allegedly incurred as the result of (1) defendants' violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (hereinafter referred to as "RICO"), (2) defendants' violation of plaintiff's civil rights under 42 U.S.C. § 1985(2), and (3) a civil conspiracy by the defendants to interfere with plaintiff's rights. Defendants have moved for summary judgment, which this Court will grant.

I. RICO Counts

In Counts 1 through 4, the plaintiff asserts violations of RICO, which provides civil remedies in the form of treble damages for "[a]ny person injured in his business or

property by reason of a violation." 18 U.S.C. § 1964(c). The word "person" includes the plaintiff corporation. 18 U.S.C. § 1961.

Plaintiff contends that defendants Lloyd, Craig and Crown Life Insurance Company (hereinafter referred to as "Crown") associated themselves as an enterprise for the purpose of taking over various Crown insurance agencies that had lucrative territories in the United States. (Complaint, ¶18). Plaintiff alleges that defendants used mail and wire communications and travel in interstate and foreign commerce to accomplish their goal. The takeover scheme consisted of the setting in 1977 of a sham production quota too high to be met and the seizing of the agency by defendants in 1978 when it failed to meet the quota. These allegations also form the basis of a complaint filed on April 5, 1978, at Civil Action No. 78-373 (hereinafter referred to as the "1978 lawsuit").

Plaintiff further alleges that the defendants obstructed justice by intentionally interfering with plaintiff's prosecution of the 1978 lawsuit. Specifically, plaintiff charges the defendants with (1) destruction of evidence, (2) circulation of false and defamatory information to the media about the judge who was originally assigned to the 1978 suit, (3) subornation of perjury, (4) tampering with a witness, (5) perjury, and (6) observation of a U.S. Marshal in the performance of his duties.

The injuries alleged by plaintiff fall into two categories: (1) business injuries which are alleged in the 1978 lawsuit, and (2) injuries caused by defendants' obstruction of justice. Defendants move for summary judgment on the ground that any claim for injuries to the business is beyond

the statute of limitations, and any claim for injuries caused by the obstruction of justice falls outside the scope of RICO, or alternatively, is barred by the statute of limitations.

A. Business Injuries: Statute of Limitations

The parties agree that suits under RICO are governed by the limitations period of the most analogous cause of action under Pennsylvania law. (Defendants' brief, p. 9; plaintiff's brief, p. 86). Plaintiff argues, and this Court agrees, that the RICO claims for business injuries set forth in Counts 1 through 4 are most analogous to a common law fraud action in Pennsylvania. (Plaintiff's brief, p. 90). However, this Court disagrees with plaintiff's conclusion that the applicable statute of limitations for fraud actions is six years.

The plaintiff cites *Sharp v. Coopers & Lybrand,* 649 F.2d 175, 191-192 (3d Cir. 1981), *cert. denied,* 455 U.S. 938 (1982), for the proposition that fraud "falls within the catch-all provision of Pennsylvania's six-year statute of limitations." (Plaintiff's brief, p. 90). Clearly, that is *not* the holding in the *Sharp* case. The plaintiff filed suit on May 4, 1975, in the *Sharp* case. The applicable statute of limitations was six years at the time the suit was commenced in *Sharp.* Pa.Stat.Ann. Tit. 12, § 31 (Purdon 1953). This statute has since been repealed and replaced by 42 Pa.C.S.A. §§ 5521-5536 (1978). In holding that the six-year statute of limitations for common law fraud applied in *Sharp,* the Court cited its previous holding in *Biggans v. Bache Halsey Stuart Shields, Inc.,* 638 F.2d 605 (3d Cir. 1980). The Court noted in *Biggans* that, since June 27, 1978, the date on which the Judicial Code estab-

lishing a new limitations scheme became effective, it has been unclear whether the two-year period under § 5524(3) or the six-year catch-all provision under § 5527(6) applies to common law fraud actions. *Biggans,* 638 F.2d at 607 n. 2. The Court did not resolve the issue in *Biggans* because the plaintiff had filed suit prior to the effective date of the Judicial Code. Plaintiff filed suit in this action on March 20, 1981; the Judicial Code clearly applies to plaintiff's action.

Two courts have addressed the question of which limitation period applies. In *Bickell v. Stein,* 291 Pa. Super. 145, 435 A.2d 610 (1981), the Pennsylvania Superior Court upheld a lower court's dismissal of an action alleging fraud and interference with contractual relations on the ground that the action "was not commenced within the two-year period provided by the *applicable* statute, 42 Pa.C.S.A. § 5524(3) and (4)." *Id.* at 149, 435 A.2d at 612[1] (emphasis added). In *Fickinger v. C. I. Planning Corp.,* 556 F. Supp. 434 (E.D. Pa. 1982), Judge Shapiro reviewed the legislative policy behind revision of the statutes of limitation in Pennsylvania and concluded that the two-year period set forth in 42 Pa.C.S.A. § 5524(3) controls. This Court agrees that the two-year period is applicable to common law fraud actions.

Although the start of the statutory limitation may be delayed by plaintiff's ignorance of the injury and its operative cause, *Bickel,* 291 Pa. Super. at 149-150; 435 A.2d at

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[1]42 Pa.C.S.A. § 5524(3) provides that "[a] action for taking, detaining or injuring personal property, including actions for specific recovery thereof" must be commenced within two years.

612, plaintiff clearly cannot plead such ignorance as to its business injuries. As stated previously, the plaintiff pleaded fraudulent termination of the agency by use of a sham production quota in a case filed in 1978. Thus, the claim for injury to the business through termination and loss of vested renewal premiums is clearly barred by the statute of limitations.

B. Injuries Cause by Interference with Lawsuit:

Scope of RICO

With respect to the claim for injuries caused by obstruction of justice through intentional interference with plaintiff's prosecution of the lawsuit, defendants argue that such injuries do not fall within the scope of RICO. Plaintiff seeks recovery under 18 U.S.C. § 1964(c), which provides as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Counts 1 through 4 incorporate allegations that the defendants violated subsections (d), (c), (b), and (a) of § 1962, respectively.

The issue is whether interference with plaintiff's 1978 lawsuit is an injury to the plaintiff's "business or property" within the meaning of RICO. This Court agrees with the analysis of District Judge Garrity in *Van Schaick v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125, 1136-1137 (D. Mass. 1982):

> [Section 1964(c)] extends a treble damage remedy to any person injured in "business or property" by a violation of § 1962. Little legislative history exists on the clause. But courts which have recently considered § 1964(c) have interpreted it narrowly . . . They have consistently concluded that § 1964(c) must be interpreted with careful attention to the provision's purpose and have avoided a slavish literalism that would escort into federal court through RICO what traditionally have been civil actions pursued in state courts . . . Just as in the antitrust context the Supreme Court has held that the Clayton Act's treble damage provisions are available to remedy only "injury of the type the antitrust laws were intended to prevent," . . . so, too, § 1964(c) addresses only a specific sort of injury arising out of racketeering . . . Indeed, it is telling that whereas RICO's other criminal and civil penalties apply generally to violations of § 1962, the remedy which § 1964(c) prescribes extends only to persons who suffer a specific injury, viz., to their business or property.
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> • • •
>
> The cases in which courts held that plaintiffs have, or but for some other defect could have, stated a claim under § 1964(c) have involved business persons engaged in conventional commercial activity who allegedly suffered commercial injury.
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> • • •
>
> To be sure RICO uses the disjunctive in referring to "business or property." Yet we believe that phrase must be read with the statute's primary purpose—to protect legitimate businesses from infiltration by racketeers—in mind . . . [W]e believe courts should confine § 1964(c) to business loss from racketeering injuries.

(Citations omitted). *See also Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449, 457 (7th Cir. 1982).

The injury suffered by plaintiffs as the result of interference by the defendants with its 1978 lawsuit is not a business injury within the meaning of RICO. Furthermore, there are sound policy reasons for construing the statute as not permitting plaintiff to file a separate suit under RICO for injuries which allegedly resulted from defendants' obstruction of justice in its 1978 lawsuit. For the same reasons that no cause of action is available to a party who alleges that perjured testimony in a prior case caused him injury, no separate civil cause of action under RICO should be permitted for opprobrious conduct during the litigation of a single case. There are other remedies available to plaintiff for such wrongs; e.g., discovery, sanctions, evidentiary inferences in the original suit, contempt citations, and referral to the proper authorities for criminal investigation. The lure of lucrative treble damages under RICO is too great to permit recovery for such conduct as an injury to the person's "property." An enormous multiplicity of suits could result from holding otherwise.

II. Section 1985(2) Claim

In Count 5, plaintiff alleges that defendants Lloyd, Craig, Crown, Pariano, Agency Holding Corporation of Illinois and Agency Holding Corporation of Ohio "formed a conspiracy to obstruct justice and to violate plaintiff's civil rights in connection with the [1978 lawsuit]." (Complaint, ¶ 34). Plaintiff alleges the following acts were committed by the defendants in furtherance of the conspiracy: (1) the hiring of a private investigator to follow the judge who was initially assigned to this case in an effort to find a basis for seeking his recusal; (2) the hiring of a private investigator to follow plaintiff's counsel "to intimidate

plaintiff's counsel with respect to his representation of plaintiff in the [1978 lawsuit]"; (3) threats and intimidation of witnesses and an attempt to prevent them from testifying; (4) destruction of relevant documents in the 1978 lawsuit, and (5) subordination of perjury. In paragraph 39 of the complaint, plaintiff alleges that such acts "constitute a conspiracy to deter, by intimidation and threat, Plaintiff and witnesses in the [1978 lawsuit] from prosecuting that action and from testifying therein in violation of 42 U.S.C. § 1985." Defendants move for dismissal on several grounds: (1) the plaintiff's failure to allege class-based animus; (2) plaintiff's failure to allege a cause of action under § 1985(2); (3) the lack of cognizable injury under § 1985; and (4) the statute of limitations.

Although plaintiff does not specifically state whether it is proceeding under the first or second clause of § 1985 (2), the language of paragraph 39 closely tracks the first clause. Furthermore, no cause of action would lie under the second clause of § 1985(2) because the Supreme Court has clearly stated that the second clause "applies to conspiracies to obstruct the course of justice in state courts." *Kush v. Rutledge*, — U.S. —, 103 S. Ct. —, 75 L.Ed.2d 413, 419 (1983). Also, the Court implied that a cause of action under the second clause, unlike a cause of action under the first clause, would require a showing of class-based, invidiously discriminatory animus. *Id.* Since plaintiff did not allege interference with a state court proceeding nor class-based discriminatory animus, the Court concludes that no cause of action has been alleged under the second clause of § 1985(2). *See Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976).

The first clause of § 1985(2) provides as follows:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror . . .

In *Brawer v. Horowitz,* 535 F.2d 830 (3d Cir. 1976), the Third Circuit upheld the dismissal of a complaint for failure to state a cause of action under § 1985(2) brought by two persons convicted of transporting stolen United States treasury bills. The plaintiffs had alleged that the prosecuting attorney conspired with a co-defendant who pled guilty "to secure the convictions of plaintiffs with the knowing use of false and perjured testimony." *Id.* at 832. The Third Circuit reasoned that, although such an allegation could be construed as stating a cause of action under the first clause of § 1985(2) which prohibits "conspir[ing] to . . . influence the verdict . . . or indictment of [the] grand or petit juror[s]," such a construction would be "impermissibly generous." *Id.* at 840. Instead, the Third Circuit concluded that the first clause of § 1985(2) "concern[s] itself with conspiratorial conduct that *directly* affects or seeks to affect parties, witnesses, or grand or petit jurors."

Using this analysis as a guide, the Court will now scrutinize plaintiff's allegations in Count 5. Four of

plaintiff's allegations clearly fall outside the scope of § 1985(2): intimidation of the presiding Judge, intimidation of plaintiff's counsel, destruction of relevant evidence, and subornation of perjury. The allegation that plaintiff's witnesses were intimidated, however, requires closer examination. Defendants raise two specific arguments with respect to these allegations: (1) only the person deterred from attending or testifying in court, or injured as a result of attending or testifying in court, may bring an action; and (2) alternatively, § 1985(2) does not apply to prosecution of an action, but rather to actual attendance or testimony in court. Plaintiff has not alleged injury on account of the failure of a witness to appear in court or the presentation of false testimony in court as a result of defendants' actions.

Defendants' first argument, that only the person deterred has standing, has been addressed by two district courts. In *Burch v. Snider,* 461 F.Supp. 598, 600 (D. Md. 1978), Chief Judge Northrop held that the language of § 1985(2) "creates a cause of action for 'parties' only insofar as they are themselves deterred from or injured on account of testifying or attending federal court. The plain words of the statute do not give parties a right to sue based on intimidation of their witnesses." In *Kelly v. Foreman,* 384 F. Supp. 1352, 1353 (S.D. Texas 1964), District Judge Singleton focused instead upon the remedial language of the statute. Section 1985(3) provides as follows:

> In any case of conspiracy set forth in [§ 1985], if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person

> or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Judge Singleton held that the statute clearly creates a cause of action for any person injured in the course of the alleged conspiracy. This interpretation better serves the effectuation of § 1985's purposes. In almost every case, it will be the *party* who suffers injury as a result of the intimidation of witnesses. What damages can the *witness* who was deterred from testifying claim? Thus, this Court concludes that a party may claim injury based on the intimidation of his witnesses.

Defendants' second argument, that § 1985 does not apply to prosecution of an action, was addressed by the Fifth Circuit Court of Appeals *en banc* in *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (1981). The Fifth Circuit upheld a summary judgment in favor of an employer where plaintiffs claimed that they were fired as a result of filing workmen's compensation claims. In reaching its decision, the Fifth Circuit made the following comments regarding § 1985(2):

> Passage of the Ku Klux Klan Act was "motivated by a desire to prevent and punish acts of terror or intimidation that threatened the attempt to create a political environment hospitable to equality . . ." In light of the acts of violence that threatened the sanctity of federal courts, Congress meant Section 1985(2) to protect a party based on his physical presence while attending or testifying in court. In this case, no allegations were made that plaintiffs were injured because they attended or testified in

> federal court . . . [Section 1985] was intended to protect against direct violations of a party or witness's right to attend or testify in federal court. This clear congressional purpose is best served by construing the statutory language in its ordinary meaning so that only direct interference with a federal court if prohibited.

Id. at 348 (citations omitted); *cf. Keating v. Carey*, 706 F.2d 377, 386 n. 13 (2nd Cir. 1983).

In order for plaintiff to establish a cause of action under § 1985(2), plaintiff must show that an act in furtherance of the object of the conspiracy caused injury to the plaintiff through direct interference with a federal court. Thus, the plaintiff must allege injury occasioned by (1) a conspiracy to deter plaintiff from attending or testifying truthfully, or (2) deterrence of one of plaintiff's witnesses which resulted in the witness's failure to attend court or to testify in court truthfully, with plaintiff's consequent loss of court action or diminshment of recovery, or (3) injury to the plaintiff on account of having attended court or having testified in the 1978 lawsuit. Plaintiff claims as its injuries expenses and delays in the pretrial stages of its 1978 lawsuit and the suppression of relevant and material evidence during the discovery phase of that action.[2]

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[2]Since the filing of this complaint, plaintiff has tried and won its 1978 lawsuit, though an appeal is pending. Plaintiff has not sought to amend its complaint to allege that any witness failed to appear or to testify truthfully in the trial of that suit as a result of defendants' actions, nor has the plaintiff submitted any affidavit, claiming such an injury, subsequent to the trial of the 1978 lawsuit. The fact that plaintiff won its 1978 lawsuit

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(Complaint, ¶40). Thus, plaintiff has failed to allege a cognizable injury under § 1985(2).[3]

III. Civil Conspiracy

In Count 6, plaintiff alleges a civil conspiracy at common law. With the dismissal of Counts 1 through 5, there remains no basis for the exercise of federal jurisdiction. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

An appropriate Order will be issued.

/s/ Alan N. Bloch

Date: March 23, 1984

cc: Counsel of record.

(Continued from previous page)

despite defendants' obstructions of justice (assumed to be true for purposes of this motion) reaffirms the need to limit § 1985(2) to direct interferences with federal court. Perhaps plaintiff's witnesses were *not* deterred from appearing *in court* or testifying truthfully *in court:* that is the only injury § 1985(2) is intended to remedy. Furthermore, it does not make sense to allow recovery for pretrial obstructions of justice in a case which plaintiff may eventually win, in part, through effective use of inferences to be drawn from those same obstructions of justice.

[3]Obviously, by this reasoning, plaintiff's cause of action for intimidation of anyone other than plaintiff cannot arise prior to trial of the action. If the Court has erred and plaintiff does indeed have a cause of action for expenses and delays occasioned by defendants' deterrence of plaintiff's witnesses at the pretrial stage, then the plaintiff's action may yet be barred by the statute of limitations.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-439

MALLEY-DUFF ASSOCIATES, INC.,

Plaintiff,

vs.

CROWN LIFE INSURANCE CO., a corporation, AGENCY HOLDING CORP., an Illinois corporation, AGENCY HOLDING CORP., an Ohio corporation, CLARKE BURTON LLOYD, an individual, KERRY PATRICK CRAIG, an individual, DIANE PARIANO, an individual, EHRMAN RATINI OGLEVEE & CRAIG, INC., a Pennsylvania corporation, and ROBERT OGLEVEE, an individual,

Defendants.

JUDGMENT ORDER

AND NOW, this 23rd day of March, 1984, upon consideration of the Motion for Summary Judgment filed by all Defendants on July 29, 1982,

IT IS HEREBY ORDERED that said Motion is GRANTED and that judgment be, hereby is, entered in favor of Defendants and against Plaintiff.

/s/ Alan N. Bloch
United States District Judge

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3228

MALLEY-DUFF & ASSOCIATES, INC.

Appellant

v.

CROWN LIFE INSURANCE CO., a Corp.
AGENCY HOLDING CORP, an Illinois Corp.
AGENCY HOLDING CORP, an Ohio Corp.
CLARKE BURTON LLOYD, individual
KERRY PATRICK CRAIG, individual
DIANE PARIANO, individual
EHRMAN RATINI OGLEVEE & CRAIG, INC., a Pennsylvania Corporation
ROBERT OGLEVEE, individual

On Appeal from the United States
District Court for the Western
District of Pennsylvania

(D.C. Civ. No. 81-439)

Argued: November 19, 1985

Before: HIGGINBOTHAM, SLOVITER and MANSMANN, *Circuit Judges.*

(Filed May 30, 1986)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This is an appeal from a final summary judgement of the district court dismissing the complaint of appellant Malley-Duff & Associates, Inc. ("Malley-Duff"). For the reasons that follow, we will reverse and remand for further proceedings.

I.

Until February 13, 1978, Malley-Duff was an agent of defendant Crown Life Insurance Company ("Crown Life") for a territory surrounding and including Pittsburgh, Pennsylvania. Crown Life required Malley-Duff to represent it exclusively. Malley-Duff alleges that defendants formed an "enterprise," the purpose of which was "to acquire, take over or eliminate various Crown agencies that had lucrative territories in the United States of America," and which did so by "false and fraudulent means and pretenses." The enterprise allegedly acquired Malley-Duff's agency by first imposing, nine months into the fiscal year 1977, a "bogus" production quota that could not be met, and then terminating the agency when it in fact failed to meet the quota. According to the complaint, the enterprise used similar means to acquire Crown Life agencies in Chicago, Peoria, Cleveland, Newark, Hartford, Denver, and elsewhere. It is further alleged that terminated agents were defrauded out of renewal commissions.

In April of 1978, Malley-Duff filed suit (*"Malley-Duff I"*) against defendants Crown Life, Lloyd, Craig, Agency Holding Company (Illinois), and Agency Holding Company (Ohio), as well as another individual not named in this suit, alleging violations of the federal antitrust laws and conspiracy to tortiously interfere with contract. The case was tried to a jury, but defendants won a directed verdict on the antitrust claims at the close of Malley-Duff's case. Malley-Duff won a verdict of $900,000 on the state conspiracy claim, but the jury concluded in answer to a special interrogatory that there was no tortious interference. On appeal, this court ordered a new trial, holding that there was sufficient evidence of a violation of § 1 of the Sherman Act to present a jury issue, and "that the verdict from answers on the remaining state law claims were inconsistent." *Malley-Duff & Associates v. Crown Life Insurance Company*, 734 F.2d 133, 136 (3d Cir.), *cert. denied*, 105 S. Ct. 564 (1984).

On March 20, 1981—prior to trial of *Malley-Duff I*—Malley-Duff filed the instant complaint, alleging causes of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982),[1]

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[1]18 U.S.C.§ 1964(c) creates a private cause of action:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1962 outlaws (a) the use of income derived from "a pattern of racketeering activity" or through the collection of an "unlawful debt" (defined at 18 U.S.C. § 1961(6)) to acquire an interest in or establish an enterprise engaged in or affecting

(Continued on following page)

for conspiracy to interfere with civil rights, 42 U.S.C. § 1985,[2] and a pendent state civil conspiracy theory. The RICO claims can be divided into two categories: (1) claims arising out of the allegedly fraudulent termination of the agency;[3] and (2) claims arising out of alleged obstructions

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interstate commerce, (b) the acquisition or maintenance of any interest in an enterprise through a pattern of racketeering activity or collection of an unlawful debt, (c) conducting or participating in the conduct of an enterprise through a pattern of racketeering activity or collection of unlawful debt, and (d) conspiring to violate any of these provisions. Malley-Duff's complaint contained counts based on each of the four subsections.

"Racketeering activity" is defined in 18 U.S.C. § 1961(1) as any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, any "offense" involving bankruptcy or securities fraud, and drug-related activity that is "punishable" under federal law.

A "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5).

[2]This section provides in relevant part:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[3]The complaint relies on multiple violations of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, to establish the necessary element of a "pattern of racketeering activity."

of justice by defendants in the course of the discovery phase of *Malley-Duff I*.[4] The § 1985 claims were based on the same allegedly obstructive conduct. The civil conspiracy count incorporated allegations involving both the termination and the obstructions of justice.

This case was consolidated with *Malley-Duff I* on November 2, 1981, but was severed on January 11, 1983, prior to trial. Defendants had filed a motion for summary judgmement on July 29, 1982. On March 23, 1984, the district court granted defendants' motion and entered judgement for them on all counts. This appeal followed.[5]

II.

The district court dismissed Malley-Duff's RICO claims, to the extent they arose out of the allegedly fraudulent termination of its agency, on the ground that they were barred by the applicable statute of limitations. Because federal law does not provide a statute of limitations for civil RICO actions, the district court followed the settled practice of turning to the law of the forum state (in this case Pennsylvania) to "borrow" the limitations period for the state cause of action most closely analogous

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[4]These allegations invoke 18 U.S.C. § 1503 (obstruction of justice), another RICO "predicate act." Specifically, the complaint alleges subordination of perjury, destruction of documents, interference with a United States Marshal, perjury, witness intimidation, and an attempt to blackmail the district judge originally assigned to *Malley-Duff I*.

[5]This appeal was initially listed for disposition on December 7, 1984, but was removed from the list for the purpose of supplemental briefing on issues raised by Sedima, S.P.R.L. v. Inmrex Co., — U.S. —, 105 S. Ct. 3275 (1985) and Wilson v. Garcia, — U.S. —, 105 S. Ct. 1938 (1985).

to Malley-Duff's claims.[6] *See Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462-63 (1975); *see generally* Note, *Limitation Borrowing in Federal Courts*, 77 Mich. L. Rev. 1127 (1979). The parties agreed that common law fraud was the state cause most analogous to these claims, but disagreed as to whether a two- or six-year limitations period governed such actions in Pennsylvania.[7] The district court held that the two-year statute applied, and that

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[6]As the late Judge Henry Friendly once wrote:

> It has also been long established that when Congress created a federal right but did not prescribe a period for its enforcement, federal courts will borrow the period of limitation prescribed by the state where the court sits. . . . The basis of this was that Congress could not have intended an unlimited period for enforecement as would otherwise exist in actions at law, and that, selection of a period of years not being the kind of thing judges do, federal judges should borrow the limitation statutes of the states where they sit.

Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961).

[7]There is no dispute that, prior to 1978, fraud actions were governed by a six-year statute, and that 1982 amendments to the Pennsylvania Judicial Code make it clear that such actions are now subject to a two-year limitation. *See* 42 Pa. Cons. Stat. Ann. § 5524(7) (Purdon Supp. 1985). The question of which period applied during the intervening period, when this action was filed, has been the subject of considerable litigation. *See, e.g.*, Vosbikian v. Wasserstrom, No. 84-4674 (E.D. Pa. 1985) (available on LEXIS, Genfed library, Dist file) (six years); Bernicker v. Pratt, 595 F. Supp. 1034 (E.D. Pa. 1984) (six years); Ferber v. Morgan Stanley Co., CCH Fed. Sec. L. Rep. ¶ 99,634 (E.D. Pa. 1984) (two years); Fickinger v. C-1 Planning, Inc., 556 F. Supp. 434 (E.D. Pa. 1982) (two years); Culbreath v. Simone, 511 F. Supp. 906 (E.D. Pa. 1981) (six years). *See also* Fiebach & Doret, *A Quarter Century Later—The Period of Limitations for Rule 10b-5 Damage Actions in Federal Courts Sitting in Pennsylvania*, 25 Vill. L. Rev. 851, 855-56 n.26 (1980) (six years). Because we decline to use the fraud analogy, *infra*, we need not reach this issue.

claims filed on March 20, 1981, relating to events that occurred in early 1978,[8] were therefore, time-barred.

Subsequent to the district court's decision, the Supreme Court of the United States decided *Wilson v. Garcia*, — U.S. —, 105 S. Ct. 1938 (1985), which established a three-part inquiry[9] to guide the selection of the statute of limitations that will govern a federal claim. First, we must determine whether it is state or federal law that controls the characterization of the claim. Second, we must decide whether all claims arising under a particular federal law "should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." Finally, "we must characterize the essence of the claim in the pending case, and decide which state statute provides that most appropriate limiting principle." 105 S. Ct. at 1943. In the subsections that follow we engage in the prescribed inquiry.[10]

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[8]A large part of the briefing and argument in this matter has been devoted to the difficult issue of when the RICO claims accrued. This relates to Malley-Duff's contention that even if a two-year limit applies, its claims are timely. Because we adopt a six-year period, *infra*, and it is clear that all conduct complained of occurred within that period, we do not reach the accrual issue.

[9]The Court cited no precedent for the three-part inquiry, and its origins are unclear. 105 S. Ct. at 1943. There is nothing in the opinion, however, that would suggest that the approach is unique to § 1983 cases. Indeed, it appears to us that the Court intended to mark out a general approach to all statute of limitations borrowing problems.

[10]This court has held in two cases that *Wilson v. Garcia* should be applied retroactively in § 1983 cases. *See* Smith v. City of Pittsburgh, 764 F.2d 188 (3d Cir.), *cert. denied*, 105 S. Ct.

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Our function here is to legislate interstitially, and in doing so we are mindful of Justice Holmes, admonition that we are "confined from molar to molecular motions." *Southern Pacific Co. v. Jenson*, 244 U.S. 205, 221 (1917) (dissent). We conclude that within each state all civil RICO claims should be characterized uniformly, in accordance with federal law, and that in Pennsylvania the most appropriate limitations period for all civil RICO claims is the six-year residual statute of limitations.

A. Controlling Law

In *Wilson v. Garcia*, which arose in New Mexico, the question whether state or federal law controlled the characterization of § 1983 claims was critical because the Supreme Court of New Mexico had definitively decided, as a matter of state law, that § 1983 claims should be analogized for limitations purposes to state claims brought under the New Mexico Torts Claim Act. *DeVargas v. New Mexico*, 97 N.M. 563, 642 P.2d 166 (1982). The United States Supreme Court held that *DeVargas* was not binding on federal courts. The Court noted that the "characterization of § 1983 for statute of limitations purposes is derived from the elements of the cause of action, and Congress'

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349 (1985); Fitzgerald v. Larson, 769 F.2d 160 (3d Cir. 1985). In Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), we applied *Wilson v. Garcia* retroactively to a claim brought under 42 U.S.C. § 1981. These results followed from the uncertainty that existed with regard to the applicable limitations period under Pennsylvania law prior to these cases, making it not inequitable to apply *Wilson* retroactively. *See* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Given the even greater uncertainty that has existed with regard to the applicable limitations period in this case, *see also* footnote 7 *supra*, *Wilson v. Garcia* should, *a fortiori*, apply here.

purpose in providing it. These, of course, are matters of federal law. Since federal law is available to decide the question, the language of [42 U.S.C.] § 1988 directs that the matter of characterization should be treated as a federal question." 105 S. Ct. at 1943. The court found further support in § 1988's[11] instruction that state law shall apply "so far as the same is not inconsistent with" federal law, observing that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." 105 S. Ct. at 1944. In addition, the Court stated, "[i]n borrowing statutes of limitations for other federal claims, this Court has generally recognized that the problem of characterization 'is ultimately a question of federal law.' " *Id.* (quoting *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966)) (footnote omitted).

We have found no decisions of the Pennsylvania Supreme Court, or any lower court, purporting to character-

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[11]Section 1988 provides in relevant part:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

ize RICO claims under Pennsylvania law for limitations purposes. Nonetheless, if state law were to control the characterization our function would be to predict how the Pennsylvania Supreme Court would act, rather than to apply the principles developed by the U.S. Supreme Court in *Wilson v. Garcia* and other "borrowing" decisions. Thus, we cannot overlook this issue. Fortunately, we believe the resolution is quite clear. Though we cannot rely, as the Court did, on § 1988, we note that its borrowing principles are not unique—the confluence of the Supremacy Clause and the Rules of Decision Act produce the same result in other cases: "If . . . federal law is both pertinent and valid, it applies because the supremacy clause of the Constitution so commands; if the federal law is impertinent or invalid, state law applies because Congress has so directed." Western & Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 Mich. L. Rev. 311, 316 (1980). Moreover, the federal interests in uniformity and having "firmly defined, easily applied rules," emphasized in *Wilson v. Garcia*, 105 S. Ct. at 1944 (quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)) apply with as much force to RICO as to other federal causes, such as § 1983, § 301 of the Labor Management Reporting Act, *see Auto Workers, supra,* or the federal antitrust laws, *see* Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 83-84 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961), *Wilson v. Garcia*, 105 S. Ct. at 1944 n.19. We conclude that federal law controls characterization of RICO claims for limitations purposes.

B. Uniform or Particularized Characterization?

In characterizing Malley-Duff's termination-related RICO claims as analogous to claims for common law fraud,

the parties and the district court have followed the settled borrowing practice within this Circuit of parsing the particular factual allegations and legal theories supporting an individual federal claim, rather than looking to the federally-created cause of action for a broader analogy that could encompass all claims brought thereunder in a given state. In *Wilson v. Garcia* the Supreme Court adopted the latter approach in the context of § 1983 cases, and we believe that their reasoning suggests that the same approach should be followed with civil RICO.

In *Wilson v. Garcia* the Court noted that the practice of borrowing state statutes of limitations promotes the policy of repose, but that

> when the federal claim differs from the state cause of action in fundamental respects, the State's choice of a specific period of limitation is, at best, only a rough approximation of "the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

105 S. Ct. at 1945 (quoting *Johnson v. Railway Express Agency*, 421 U.S. at 463-64). Section 1983, the Court stated, "can have no precise counterpart in state law . . . [A]ny analogies to those causes of action are bound to be imperfect." *Id.* (footnote omitted).

> In this light, practical considerations help to explain why a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose. The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983. Almost every § 1983 claim can be

> favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations. . . .
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> . . . If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim. Moreover, under such an approach different statutes of limitations would be applied to the various § 1983 claims arising in the same State, and multiple periods of limitations would often apply to the same case. There is no reason to believe that Congress would have sanctioned this interpretation of its statute.

105 S. Ct. at 1945-46 (footnotes omitted).[12] The Court also expressed a concern that the somewhat arbitrary selection of one analogy over another can appear result-oriented, and thereby undermine the appearance of neutral justice. 105 S. Ct. at 1945 n.24. The Court concluded that "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach" of selecting "in each State, the one most appropriate statute of limitations for all § 1983 claims." 105 S. Ct. at 1947.

Civil RICO is as far removed from any traditional state cause of action as is § 1983.[13] This is well-illustrated

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[12]This court had followed the case-specific approach rejected by the Supreme Court in *Wilson v. Garcia*. *See* Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974)(in banc).

[13]We do not suggest that civil RICO is a uniquely federal remedy in the same sense as § 1983. A state could, as some have, create a private cause of action substantially similar to civil RICO. *See* Wright, *A Look at State RICO Statutes in RICO: Expanding Uses in Civil Litigation* (1984). Pennsylvania's RICO-type statute, 18 Pa. Cons. Stat. Ann. § 911 (Purdon 1983), how-

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by *Durante Brothers and Sons v. Flushing National Bank,* 755 F.2d 239 (2d Cir.), *cert. denied,* 105 S. Ct. 3530 (1985), where the Court of Appeals rejected the district court's choice of a state statute of limitations for actions to recover an overcharge of interest in a RICO case predicated on collection of an unlawful debt. The court pointed out that the seemingly apt analogy dissolved when the elements of the RICO claim were closely examined:

> In the context of the allegations made here, therefore, success on these counts would require proof that, *inter alia,* (1) there was a RICO enterprise, (2) its activities affected interstate commerce, (3) the individual defendants were employed by or associated with the enterprise, (4) the Bank used, in the operation of the enterprise, income derived from the collection of unlawful debt, and (5) the individual defendants participated in the conduct of affairs of the enterprise through the collection of unlawful debt. 18 U.S.C. § 1962(a) and (c). In addition, to prove that what was collected was an unlawful debt within the meaning of RICO, Durante would have to show that (6) the debt was unenforceable in whole or in part because of state or federal laws relating to usury, (7) the debt was incurred in connection with "the business of lending money . . . at a [usurious] rate," and (8) the usurious rate was at least twice the enforceable rate. *Id.* § 1961(6). And Durante would have to show that (9)

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ever, does not provide for a private cause of action. See D'Iorio v. Adonizio, 554 F. Supp. 222, 232 (M.D. Pa. 1982). Though we do not have occasion to so decide, we note that where a state has created a private cause of action substantially similar to the federal civil RICO action, the state limitations period controlling such actions might be an appropriate choice for the federal courts to borrow, provided the period is not so short as to contravene federal policies.

> as a result of the above confluence of facts, (10) it was injured in its business or property. *Id.* § 1964(c).

755 F.2d at 248.

The court went on to state:

> The above listing of elements that must be proven in order to establish civil RICO liability for collection of an unlawful debt makes clear that the civil RICO action is not simply an action to recover excessive interest or to enforce a penalty for the overcharge. RICO is concerned with evils far more significant than the simple practice of usury. . . . In contrast, a state law claim . . . could be established without proof of nine of the ten listed elements of the civil RICO claim.

755 F.2d at 248-49. We believe a similar analysis would apply to any RICO claim. Concepts such as RICO "enterprise" and "pattern of racketeering activity" were simply unknown to common law, and all federal crimes contain jurisdictional and other elements irrelevant to any state civil action. Thus, as with § 1983, any analogies to traditional state causes of action "are bound to be imperfect." *Wilson v. Garcia,* 105 S. Ct. at 1945.

This case provides abundant evidence that a particularized approach to borrowing statutes of limitations "inevitably breeds uncertainty and time-consuming litigation." Even RICO claims based on "garden variety" business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods. A state may even have different limitations periods for common law fraud and securities fraud. *See also Eisenberg v. Gagnon,* 564 F. Supp. 1347, 1353-54 (E.D. Pa. 1983), *rev'd in part,* 766 F.2d 770 (3d Cir.), *cert.*

denied, 106 S. Ct. 343 (1985). More extreme cases might include allegations sounding in assault, battery, false imprisonment, infliction of emotional distress, abuse of process, or trespass to land or chattels. The fact that RICO requires at least two predicate acts in all cases makes it even more likely that more than one analogy will have force in a given case.[14] "The current approach is virtually guaranteed to incite complex and expensive litigation over what should be a straightforward matter." A.B.A. Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Civil RICO Task Force* 391-92 (1985) [hereinafter cited as "*Task Force Report*"].[15]

In *Wilson v. Garcia* the Court stated that "the legislative purpose to create an effective remedy for an enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." 105 S. Ct. at 1947 (footnote omitted). Like § 1983, civil RICO was intended to be a useful remedial device and a supplement to criminal law enforcement in an area

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[14]The statutory definition of 'racketeering activity,' 18 U.S.C. § 1961(1) contains a laundry list of federal and state offenses. Unless the two alleged predicate acts are closely related, . . . it is unlikely that both acts could be subject to the same statute of limitations. Under these circumstances, the federal court would be saddled with the unenviable task of selecting one of the two disparate limitations periods. Defendants would solve this dilemma by requiring the court to determine which predominates the complaint. Such a process could be arbitrary at best, and this Court is unwilling to engage in such capricious selections. Morley v. Cohen, 610 F. Supp. 798, 809 (D. Md. 1985).

[15]This report was issued March 28, 1985 by a five member task force. It is neither approved by the A.B.A. nor does it represent the A.B.A.'s official position. It was, however, cited extensively by both the majority and dissenters in *Sedima*.

peculiarly in need of federal intervention. *Sedima,* 105 S. Ct. at 3286. As today's cases demonstrate, its effectiveness can be substantially thwarted by uncertainty, with the concommitant dissipation of legal resources. We hold, then, that in borrowing state limitations periods for civil RICO claims courts must select, in each state, the *one* most appropriate statute of limitations for *all* civil RICO claims. *See also Electronic Relays v. Pacente,* 610 F. Supp. 648 (N.D. Ill. 1985); *Victoria Oil v. Lancaster Corp.,* 587 F. Supp. 429 (D. Colo. 1984). *But see Silverberg v. Thomson McKinnon Securities,* No. 85-3349 (6th Cir. April 10, 1986).

C. The Applicable Limitations Period

The final stage in our inquiry is the selection of the one Pennsylvenia limitations period that will govern all civil RICO actions arising there. This process of characterization cannot take place in a vacuum—it would accomplish nothing to characterize civil RICO in a way that does not correspond to any existing Pennsylvania statute of limitations. Rather, we must, as the Supreme Court did in *Wilson v. Garcia,* choose the best out of the available candidates. We have been greatly aided in this process by the parties' thorough supplemental briefing.

In *Wilson v. Garcia,* the Supreme Court chose a state limitations period for "personal injury" actions to govern § 1983 cases in New Mexico.[16] Given that the Court had

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[16]The Court was careful to acknowledge that its approach would only achieve uniformity within each state. Though this can, in part, be a result of the fact that states will prescribe different period of years for the same actions, the Court must also have been aware that a characterization useful in one state may

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earlier conceded that characterization "will often be somewhat arbitrary," 105 S. Ct. at 1946 n.24, it should not be surprising that the Court did not present a very detailed rationalization for its choice. Nonetheless, there is some guidance to be extracted from their discussion.

The Court noted that "[t]he atrocities that concerned Congress in 1871 plainly sounded in tort." 105 S. Ct. at 1948. Of the potential tort analogies, the Court stated that "Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." *Id.* The Court's basis for this categorical statement was the language of the fourteenth amendment: "no *person* shall be deprived of life, liberty or property . . ." "A violation of that command is an injury to the individual

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find no counterpart in others. As Justice O'Connor pointed out in dissent, 105 S. Ct. at 1953, on the very day the Tenth Circuit decided *Wilson v. Garcia,* it also held that the personal injury characterization found no counterpart in Colorado's limitations scheme, and therefore adopted a different characterization and borrowed the catchall limitations period for actions on a statute. McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984)(in banc). In still another case decided the same day, the Tenth Circuit borrowed a four-year statute of limitations which applies to actions for relief "not othewise provided for by law" for § 1983 actions arising in Utah, Mismash v. Murray City, 730 F.2d 1366 (10th Cir. 1984)(in banc), *cert. denied.* 105 S. Ct. 2111 (1985). Thus, Judge Sloviter's concurrence in A.J. Cunningham Packing Corp. v. Congress Financial Corp., Nos. 85-3366 & 85-3380, is not correct in stating that the "absence of an available 'catch all' in all states" distinguishes this case from *Wilson v. Garcia.* Our choice of a characterization for civil RICO actions in Pennsylvania does not preclude choice of a different approach in other states within this Circuit. *See* footnote 13 *supra,* regarding State RICO statutes.

rights of the person." *Id.* The only other point the Court mentioned as favoring the personal injury characterization was that:

> General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when § 1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.

105 S. Ct. at 1949.

We may also obtain some guidance from the Court's reasons for rejecting two other proposed analogies. First, the Court stated that the "relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many states." 105 S. Ct. at 1948 (also noting that § 1983 enforces constitutional, not only statutory rights). Second, the Court rejected an analogy to state remedies for wrongs committed by public officials as it was the very inadequacy of such remedies, "that led Congress to enact the Civil Rights Act in the first place." 105 S. Ct. at 1949 (footnote omitted).

With this background, we proceed to consider the merits of various limitations periods available under Pennsylvania law.[17] The suggested candidates are the

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[17]It has also been suggested that this court borrow the Clayton Act's four-year limitation on private treble damage antitrust suits. In DelCostello v. Int'l Brotherhood of Teamsters,

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limitations periods for common law fraud,[18] for civil penalty or forfeiture, 42 Pa. Cons. Stat. Ann. § 5524 (a "potpourri" two-year statute of limitations), and the "catch-all" six-year residual statute of limitations. Clearly, we should not expect an epiphany through which the "essence" of civil RICO is revealed to us. Rather, we can hope for no more than finding a workable rule that is

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462 U.S. 151 (1983), the Supreme Court held that federal courts should "turn away from state law" and borrow a limitation period from elsewhere in federal law "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making." 462 U.S. at 172.

A number of things can be said in favor of this characterization. RICO was drafted with the antitrust model of criminal sanctions supplemented by private treble damage actions in mind. Both the Clayton Act and RICO require that private plaintiffs be persons who have been "injured in [their] business or property." 15 U.S.C. § 15(a);18 U.S.C. § 1964(c). Also, both RICO and the antitrust laws deal with a wide range of conduct affecting commerce. Finally, in favor of this characterization, it can be said that it promotes uniformity—not only within a state, but nationally as well.

The factors militating against this characterization are that (1) though RICO and the Clayton Act both require injury to business or property for standing to sue, there is little overlap between the types of *conduct* that are prohibited; and (2) despite the fact that Congress consciously drew upon the antitrust model in drafting RICO, it did not include a comparable statute of limitations period, perhaps indicating a congressional intent that there not be a national standard. We have been cited no relevant legislative history on this point.

On balance, we do not believe the Clayton Act analogy meets the high standard required by *DelCostello* to justify "turning away from state law." *See also Task Force Report* at 385-392.

[18]As noted previously, it is not clear what that period was at the time this case was filed. *See* footnote 7 *supra* and accompanying text.

consonant with the purposes of civil RICO, and defensible under reasonably neutral criteria of statutory construction.

Fraud

Malley-Duff has suggested that common law fraud would provide a suitable analogy for all civil RICO claims. As one court has stated, however, "it is obvious that the common law fraud analogy falls far short of capturing the multitude of factual bases on which RICO can be based." *Electronic Relays,* 610 F.Supp. at 651. We, too, are reluctant to elevate one predicate act among many to the status of a uniform RICO characterization. Even if it is true, as Malley-Duff argues, that fraud is the predicate act upon which most civil RICO actions are premised, *see also Task Force Report* at 55-56, we must note that this trend has been the subject of increasing disquietude over the federalization of state common law. *See Sedima,* 105 S. Ct. at 3293 (Marshall, J., dissenting); 131 Cong. Rec. S10285-88 (1985) (Remarks of Sen. Hatch). Many current proposals to curtail civil RICO are directed to precisely this point. For example, Senate Bill 1521, 99th Cong., 1st Sess. (1985), would require at least one predicate act other than mail, wire, or securities fraud to make out a civil RICO claim.

Though the suggestion is not without some merit, we think that characterizing RICO as essentially a fraud

action would be to have the tail wag the dog. We reject this approach.

Civil Penalty or Forfeiture

It is also suggested that RICO can be broadly analogized to actions for civil penalty or forfeiture. In Pennsylvania such actions are now governed by a two-year statute of limitations, 42 Pa. Cons. Stat. Ann. § 5524(5) (Purdon Supp. 1985), although at the time these cases were brought, it was a one-year period when brought by private parties, 42 Pa. Cons. Stat. Ann. § 5523(2)(1981).

We do not find this analogy forceful. Civil RICO is clearly not a forfeiture statute—the recovery of a successful private plaintiff is based on the injury sustained ("three-fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"), not on what the defendant has gained through illegal conduct. Nor do we think the treble damage provision is primarily intended as a penalty. *See Task Force Report* at 391. More important, it is an incentive for private attorneys general to bring suit. We would also be concerned that the one-year limitations period that would be applicable to this case if the forfeiture analogy were adopted may, because it is so short, contravene the broad *remedial* purposes of civil RICO. We decline to characterize civil RICO as a penal statute.

42 Pa. Cons. Stat. Ann. § 5524

Section 5524 is a two-year statute of limitations, covering a potpourri of civil actions. It provided at the time relevant to this appeal:

The following actions and proceedings must be commenced within two years:

(1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.

(2) An action to recover damages for injuries to the person or for the death of an inidividual caused by the wrongful act or neglect of or unlawful violence or negligence of another.

(3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.

(4) An action for waste or trespass of real property.

(5) An action upon a statute for civil penalty or forfeiture, where the action is given to a government unit.

(6) An action against any officer of any government unit for the nonpayment of money or the nondelivery of property collected upon execution or otherwise in his possession.

It is argued by amicus Congress Financial Corporation that this two-year period should be borrowed for civil RICO because "it is indisputable that almost all, if not all, of the predicate RICO acts . . . would be included, in a civil context, within § 5524."

We find this proposal without merit. The premise that most, "if not all," RICO predicate acts would be covered by this statute is transparently false. Most RICO predicate acts, such as gambling, obstruction of law enforcement, sports bribery, narcotic trafficking, violations of restrictions on payments and loans to unions, interstate transportation of stolen property, or trafficking in contraband ciga-

rettes, simply do not correspond to private causes of action under common law. As one court, seeking to find a civil RICO analogy under Colorado law has stated: "The search for a precise definition may be futile, however, since Colorado's statutes of limitations retain the language of comman law forms of action." *Victoria Oil,* 587 F. Supp. at 431.

More fundamentally, this proposal does not even do what *Wilson* commands, i.e., *characterize* the federal cause of action. Rather, it seeks to take advantage of the fortuitous circumstances that a number of potential state law analogies share a common limitations period. Such an approach will provide little guidance for the resolution of this problem in other states, and may prove particularly vulnerable to changes in the state statute of limitations scheme. We reject this approach.

"Catchall" Limitations Period

Like most states, Pennsylvania has enacted a residual "catchall" statute of limitations for actions, primarily based on statute, that are not governed by any more specific period of limitations. It provided at the time this case was filed:

> The following actions and proceedings must be commenced within six years:
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> . . .
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> (6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation).

42 Pa. Cons. Stat. Ann. § 5527 (Purdon 1981).[19] In *Wilson v. Garcia,* the Court considered, but rejected, the application of such a catchall statute to § 1983 claims:

> The relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many states. Section 1983, of course, is a statute, but it only provides a remedy and does not itself create any substantive rights. . . . Although a few § 1983 claims are based on statutory rights, . . . most involve much more. . . . These guarantees of liberty are among the rights possessed by every individual in civilized society, and not privileges extended to the people by the legislature.

105 S. Ct. at 1948-49 (footnote omitted).

The Court's reasons for rejecting this analogy in the § 1983 context simply do not apply to RICO. RICO was enacted in 1970, long after statutory causes of action and corresponding catchall limitations periods became commonplace. Thus, it would not be disingenuous (or anachronistic) to suggest that Congress might have approved of borrowing such statutes. Second RICO is a strictly statutory remedy to enforce statutory rights. Thus, *Wilson v. Garcia* does not foreclose this court from adopting § 5527 for civil RICO actions arising in Pennsylvania.

The A.B.A. Task Force on Civil RICO specifically approved of cases characterizing RICO in this way:

> There are two varying approaches to characterizing RICO claims. Most courts use the state limita-

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[19]The current catchall provision is the same in all material respects. 42 Pa. Cons. Stat. Ann. § 5527 (Purdon Supp. 1985).

> tions period applicable to state law claims most similar to the *predicate offenses* alleged as part of the RICO claim. These cases in effect assume that the thrust of the RICO claim is to compensate injury caused by the underlying predicate offenses. In contrast, a few courts view RICO claims more broadly as a special statutory cause of action as to which the predicate offenses are only one element. These courts opt for the use of a state statute, if available, applying generally to all statutory causes of action that have no express statute of limitations.
>
> The latter approach seems more consistent with the overall concept of RICO than the former. RICO is manifestly directed towards activities that go beyond the mere commission of predicate offenses, and many courts have balked at the concept of RICO as simply a new or alternative civil remedy for the underlying criminal violations.

Task Force Report at 389-91 (emphasis in original). *See also Compton v. Ide,* 732 F.2d 1429 (9th Cir. 1984); *Teltronics Services v. Anaconda-Ericsson, Inc.,* 587 F.Supp. 724 (E.D.N.Y. 1984), *aff'd,* 762 F.2d 185 (2d Cir. 1985); *Seawell v. Miller Brewing Co.,* 576 F. Supp. 424 (M.D.N.C. 1983). *See also Durante Brothers, supra,* (applying catchall statute to case before court); *Creamer v. General Teamsters Local Union,* 579 F. Supp. 1284 (D. Del. 1984) (same).

Such an approach, moreover, recognizes that civil RICO is truly *sui generis* and that particular claims cannot be readily analogized to causes of action known at common law—the very observation that led us to search for a uniform limitations period in the first place. And like personal injury statutes, the catchall statutes are particularly unlikely to be fixed in a manner that would discriminate against federal claims. Thus, we hold that

civil RICO actions arising in Pennsylvania shall be governed by the six-year limitations period of 42 Pa. Cons. Stat. Ann. § 5527. Because it is clear that the acts relating to the termination of Malley-Duff's agency occurred within six years of the time this action was filed, we will reverse the district court's dismissal of the RICO claims arising out of these alleged acts.[20]

III.

The district court dismissed the RICO claims predicated on the alleged obstructions of justics in *Malley-Duff I* because, it held, interference with a lawsuit did not constitute an injury to "business or property" within the meaning of RICO. We believe, especially in light of the Supreme Court's intervening decision in *Sedima*, that this constituted reversible error.

The district court relied on the analysis of Judge Garity in *Van Schaick v. Church of Scientology*, 535 F. Supp.

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[20]In the wake of *Sedima*, in which both the majority and dissenting opinions stressed the need for courts to develop a meaningful approch to the RICO requirement of a "pattern" of racketeering activity, defendants have argued that, even if timely, Malley-Duff's RICO claims should be dismissed as failing to allege such a pattern. *Sedima* did not, however, give much guidance as to how "pattern" should be interpreted, other than to suggest that "continuity plus relationship" of predicate acts might be required. 105 S. Ct. at 3285 n. 14 (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)). We have no occasion to define its parameters here. Even under the very restrictive definition of "pattern" defendants would have us adopt, *see Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986), *Northern Trust Bank/O'Hare v. Inryco, Inc.*, 615 F. Supp. 828 (N.D. Ill. 1985), Malley-Duff's allegations of similar conduct in Cleveland, Chicago and other cities seems to us a sufficient pleading of a "pattern" of racketeering injury.

1125 (D. Mass. 1982), wherein he concluded that "persons injured in their business or property" should be read as meaning "business persons engaged in conventional commercial activity who allegedly suffered commercial injury" and that civil RICO should be "confine[d] . . . to business loss from racketeering injuries." 535 F. Supp. at 1136-37. Interference with a lawsuit, the district court here said, was not such an injury. It went on to state that there were sound policy reasons for construing RICO as not permitting this claim: "There are other remedies available to plaintiff for such wrongs; *e.g.*, discovery sanctions, evidentiary inferences in the original suit, contempt citations, and referral to the proper authorities for criminal investigation. The lure of lucrative treble damages under RICO is too great to permit recovery for such conduct as an injury to the person's 'property'. An enormous multiplicity of suits could result from holding otherwise." App. at 20a.

Though the district court's concerns are substantial ones, we do not believe its analysis can be squared with RICO as it is written or as construed in *Sedima*. If RICO's reference to injury to "business *or* property" is to be given meaning, RICO standing cannot be limited to "business" injuries only. We would certainly think, for example, that an individual harmed in his or her personal property by loansharking activities should have a civil remedy under RICO. A cause of action, of course, if a form of "property," and when it arises out of the termination of a business, we think it is not unfair to characterize conduct tending to impair it as "business injury." The unwritten "racketeering injury" requirement—analogous to the requirement of competitive injury for antitrust standing—

was specifically addressed, and rejected, by the Supreme Court in *Sedima:*

> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. 741 F.2d at 487. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" *Ibid.* Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. . . . The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, [747 F.2d 384, 398 (7th Cir. 1984)].
>
> It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.
>
> We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. See generally [*Task Force Report*] at 55-69. Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its

> diagnosis or its remedy. The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern." We do not believe that the amorphous standing requirement imposed by the Second Circuit effectively responds to these problems, or that it is a form of statutory amendment appropriately undertaken by the courts.

105 S. Ct. at 3287 (footnote omitted).

Nor do we agree with the district court that because litigants have other potential remedies for obstructive conduct such as that alleged here, there can be no remedy under RICO. We must assume that by including obstruction of justice among the RICO predicate acts, Congress envisioned the statute being used, where all other requirements are met, to supplement remedies already available for such conduct.[21] Certainly, the possibility of a criminal prosecution cannot be sufficient reason for denying a civil RICO remedy—such a rule would eviscerate civil RICO entirety, since all predicate acts are, by definition, crimes. *See* footnote 1 *supra*. We hold that Malley-Duff's allegations of "great expenses, delays and inconvenience . . . in its prosecution of the First Lawsuit" were a sufficient pleading of injury to business or property to give Malley-Duff RICO standing. *See also Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496 (9th Cir. 1985).

---

[21]Defendants argue that Malley-Duff should be denied a RICO remedy because it opted not to pursue a motion for sanctions within the context of *Malley-Duff I*. This seems to us a question of causation of damages, rather than a question of the type of conduct remediable under RICO. The district court may address the causation issue on remand.

IV.

Count V of Malley-Duff's complaint, based on 42 U.S.C. § 1985(2), *see* footnote 2 *supra*, alleged intimidation of a trial judge, intimidation of plaintiff's counsel, intimidation of witnesses, destruction of evidence, and subornation of perjury, all in the context of the pretrial stages of *Malley-Duff I*. Rely on this court's decisions in *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976), where we held that only acts *directly* affecting parties, witnesses or jurors—and not other acts that may merely influence the proceedings—are cognizable under this statute, the district court summarily dismissed all but the witness intimidation allegations. Malley-Duff does not seem to seriously challenge this holding, and we affirm it.

The district court went on, however, to dismiss the remaining § 1985(2) allegations on the ground that the complaint did not allege that any witness was actually deterred from testifying "in court," but rather complained of delays, expenses, inconvenience, and the suppression of evidence during the pretrial phase. We think this is a crabbed and unwarranted reading of the statute, the language "in any court" is not as plain as the district court seemed to surmise and cannot be read so literally—a case may be described as "in" a certain court, even though no actual "courtroom" proceedings take place. Similarly, we think that a person asked to provide discovery in such a case, regardless of where or in what form, is for these purposes a witness "in" the court. Indeed, the statute distinguishes between being deterred from "attending such court" and from "testifying to any matter pending therein." As a policy matter, we think the statute's less than pellucid language should be read with a view to the fact

that pretrial proceedings in 1870 did not have the importance they have today. Because cases can be won or lost, or their value substantially diminished, as a result of intimidation that affects witnesses' willingness or ability to provide discovery, we hold that the statute applies.[22]

The case the district court relied on in holding that pretrial intimidation does not give rise to a cause of action under § 1985(2) is not on point. *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir.)(in banc), *cert. denied*, 454 U.S. 1110 (1981) involved a claim that employees were terminated for having filed worker's compensation claims. The statute refers to retaliation for giving testimony, not for the filing of complaints. Thus, the Fifth Circuit could not square the case before it with the language of the statute.

A case closer to this one is *Chahal v. Paine Webber*, 725 F.2d 20 (2d Cir. 1984), where the § 1985(2) claim alleged that the defendants had conspired to intimidate an expert witness into withdrawing from the case. The underlying case had not gone to trial when the § 1985(2) claim was brought, but nonetheless the court of appeals found a claim stated. Contrary to the district court here, which held that the only cognizable injuries are the actual failure

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[22] *See also* Chahal v. Paine Webber, 725 F.2d 20, 24 (2d Cir. 1984):

> The statute does not define the term "witness." However, Congress' purpose, which was to protect citizens in the exercise of their constitutional and statutory right to enforce laws enacted for their benefit, is achieved by interpreting the word "witness" liberally to mean not only a person who has taken the stand or is under subpoena but also one whom a party intends to call as a witness. Deterrence or intimidation of a potential witness can be just as harmful to a litigant as threats to a witness who has begun to testify.

of a witness to appear at trial, resulting in diminished recovery or loss of a lawsuit, the Second Circuit found it sufficient to allege as injury "the $1,410 paid to [the expert] for his services, and cost of preparing him to assist in [the underlying] action. In any event one need not suffer monetary damage to prevail in an action for denial of civil rights." 725 F.2d at 24.

We agree with the Second Circuit that "[t]he essential allegations of 1985(2) claim of witness intimidation are (1) a conspiracy between two or more persons (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiffs." 725 F.2d at 23. *See also Miller v. Glen & Helen Aircraft,* 777 F.2d at 498. Under this standard, Malley-Duff's allegations are sufficient to state a § 1985(2) claim of witness intimidation.[23]

V.

Having dismissed all of Malley-Duff's federal claims, the district court exercised its discretion and dismissed its pendent state claim for civil conspiracy as well. Because we reverse the dismissals of the federal claims, we will also reinstate the pendent claim for further consideration, intimating no view as to its sufficiency, timeliness, or merits.

---

[23]The district court stated that even if its interpretation of § 1985 (2) was erroneous, as we have now held, "plaintiff's action may yet be barred by the statute of limitations." (Emphasis added.) This does not quite rise to the level of an alternative holding, and we do not find sufficient material in this record to make this determination ourselves. Nor has the issue been argued or briefed. We will therefore leave this issue open on remand.

CONCLUSION

For the reasons stated in the foregoing opinion, we will reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

SLOVITER, *Circuit Judge,* Concurring in the judgment.

I join in Parts I, III, and IV of the majority opinion. As set forth in my concurring opinion in *A.J. Cunningham Packing Corp. v. Congress Financial Corp.,* Nos. 85-3380, 85-3366, filed today, I disagree with the majority's approach in looking to state statutes of limitations to find one applicable to civil RICO claims. Instead, I would apply the four year statute set forth in section 4 of the Clayton Act, 15 U.S.C. § 15b. The argument that a federal statute of limitations should govern was not presented by plaintiffs in this action. Nonetheless, my comments in *A.J. Cunningham* are equally applicable to the issue presented here.

Because the plaintiffs in this case filed their complaint within four years of the date that their claim accrued, I agree with the majority that their complaint was filed timely and I therefore concur in the majority's reversal of the judgment of the district court and remand for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3228

MALLEY-DUFF & ASSOCIATES, INC.,

Appellant,

v.

CROWN LIFE INSURANCE CO., a Corp.
AGENCY HOLDING CORP., an Illinois Corp.
AGENCY HOLDING CORP., an Ohio Corp.
CLARKE BURTON LLOYD, individual
KERRY PATRICK CRAIG, individual
DIANE PARIANO, individual
EHRMAN RATINI OGLEVEE & CRAIG, INC.,
a Pennsylvania Corporation
ROBERT OGLEVEE, individual

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*.

The petition for rehearing filed by appellees, Crown Life Insurance Company and Clarke Burton Lloyd, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ A. Leon Higginbotham, Jr.
A. Leon Higginbotham, Jr.
Circuit Judge

Dated: July 1, 1986

(6) (7)

No. 86-497 and 86-531

Supreme Court, U.S.
FILED
FEB 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

—o—

AGENCY HOLDING CORPORATION, ET AL.,
Petitioners

vs.

MALLEY-DUFF & ASSOCIATES, INC.
Respondent

and

CROWN LIFE INSURANCE COMPANY, ET AL.,
Petitioners

vs.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

—o—

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

—o—

BRIEF FOR RESPONDENT MALLEY-DUFF & ASSOCIATES

—o—

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QUESTIONS PRESENTED

I. WHETHER THE PURPOSE OF CIVIL RICO IS BEST EFFECTUATED AND LITIGATION MINIMIZED BY BORROWING A UNIFORM NATIONAL STATUTE FROM THE ANALOGOUS ANTITRUST LAW?

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STATEMENT OF THE CASE

The Complaint alleges that Clarke Lloyd ("Lloyd"), the Senior Agency Vice President (U.S.) for Crown Life Insurance Company ("Crown" or "Crown Life"), embarked on a plan personally to acquire and control Crown's major general agencies in the Northeastern United States (A7). Lloyd, his protege Kerry Craig ("Craig") and their co-conspirators took over Crown's agencies in Chicago and Cleveland and then turned to Pittsburgh, Pennsylvania, where plaintiff Malley-Duff & Associates, Inc. ("Malley-Duff")* and non-party Jules Ehrman each represented Crown. Using a sham production quota mailed by Lloyd, defendants simultaneously acquired the Ehrman Agency, terminated Malley-Duff, a long-standing, successful Crown Life general agent, and took over its business (A8-9). The conspirators eventually took over Crown's agencies in Toledo, Ohio; Peoria, Illinois; Minnesota; New England; New Jersey; Colorado and Arizona and then used the various agencies to divert vast sums of money from Crown Life. The enterprise Lloyd established, Agency Holding Corporation ("Agency Holding") engaged in and conducted these and various other fraudulent schemes.

Malley-Duff commenced an action in 1978 asserting claims under the Sherman Act, 15 U.S.C. § 1, and various state law causes of action, Civil Action No. 78-373 (W.D. Pa.) (*Malley-Duff I*). The record now shows that Craig and the Agency Holding defendants responded to plaintiff's request for documents in *Malley-Duff I* by shredding documents. When the shredding was discovered, defendants engaged a private detective to investigate the District Judge assigned to this case, promising a bonus if

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*Malley-Duff has no parent company, subsidiaries or affiliates under Rule 28.1.

he unearthed evidence which could be used against the judge. The detective fabricated a story about having such compromising material, and defendants planned to use it to affect the outcome of the case. When the scheme was exposed, the Judge had the action reassigned and the case was delayed two years for a federal grand jury investigation.

The instant action (*Malley-Duff II*) was filed on March 20, 1981, alleging violations of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 *et seq.*, and the Civil Rights Act, 42 U.S.C. § 1985. The District Court consolidated *Malley-Duff II* with *Malley-Duff I* and the cases proceeded to the point of trial when the court *sua sponte* severed *Malley-Duff I* for the purpose of trial. That case was tried in March-April of 1983. Appeals were taken from the decisions of the court and jury in *Malley-Duff I* resulting in *Malley-Duff & Associates, Inc. v. Crown Life Ins. Co.*, 734 F.2d 133 (3d Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984).[1]

Shortly before the Court of Appeals decided *Malley-Duff I*, summary judgment was granted in *Malley-Duff II* on all counts involving federal statutory questions and the pendent claim was dismissed (A56-58). The Court of Appeals reversed, 792 F.2d 341 (3d Cir. 1986) (A70-103). Certiorari was granted on December 1, 1986.

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1 *Malley-Duff I* remains pending in the District Court where it is awaiting the outcome of this matter so a consolidated trial can be held.

STATEMENT OF THE FACTS

A. Background

Contrary to the innocuous statement of facts presented in the opposing briefs, the consolidated record of the two cases before the district judge when he granted summary judgement included the following: Founded in 1954, Malley-Duff's agency was the oldest of seven general agencies exclusively representing Crown, a major Toronto insurance company, in Pennsylvania (Tr. 599-603, Ex. 3446)[2] and it competed with the Jules Ehrman Agency for the sale of Crown products in the Pittsburgh area. Malley-Duff's position in the market and with Crown seemed secure until Clark Lloyd included it in his plan for a "mega general agency", which became Agency Holding Corporation, controlled directly by him and operated by defendant Kerry Craig (Ex. 5008).

Lloyd became Crown's Senior Agency Vice-President for the United States in 1976, and until 1981, Crown vested him with complete power to appoint and terminate general agents and to approve loans and financing for them (Tr. 95, 172-73, 1242-43). Lloyd abused this power to terminate competent general agents in order to secure the most lucrative franchises for himself, his protege Craig and their corporation, Agency Holding. He also approved financing arrangements which provided vast sums of money to Agency Holding which were misapplied. Crown terminated Lloyd in 1981 and adopted tighter fiscal controls, but never repudiated his activities.

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[2] References designated "Tr." refer to the trial transcript in *Malley-Duff I* which was before the district court when summary judgment was granted. "Ex." refers to exhibits at the trial.

Kerry Craig, at age 21, obtained a job with Crown in 1969 and operated copying machines for three years (Tr. 58). He then transferred to Lloyd's department as a messenger (Tr. 58-9, 1306). In 1975, Lloyd named Craig to a supervisory position where he remained until he left Crown in 1977 (Tr. 59-60) to carry out Lloyd's plan as the nominal head of Agency Holding. Lloyd considered Craig an "unofficial adopted son" (Tr. 62).[3]

B. The Evolution of the Enterprise

1. Chicago, Cleveland and Preparations for Pittsburgh

In October 1976, Crown's general agent in Chicago died. Lloyd, responsible for finding a replacement, revealed to a friend, Dennis Cunningham, that he was forming a "mega general agency holding corporation" (Tr. 1075-76). Beginning in Chicago, Cleveland, Pittsburgh and Toledo, this corporation would eventually control Crown Life's general agencies in the eastern United States (Tr. 1075-77). Craig and Robert Oglevee eventually joined Lloyd in this plan, but Cunningham declined to participate. In 1977, Lloyd had Agency Holding incorporated and installed it as general agent in Chicago. He then qualified it to do business in Ohio and Pennsylvania. Craig, a Canadian citizen, began the process of obtaining a visa so that he could operate Agency Holding from within the United States.

Lloyd next terminated Crown's general agent in Cleveland and in May 1977, awarded that general agency to

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[3] The facts common to *Malley-Duff* I and II were cogently summarized by Judge Aldisert in *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co.*, 734 F.2d 133 (3d Cir. 1984).

Agency Holding (Tr. 73-74, 1343-44). Oglevee was the president, but Craig, who was still employed by Crown Life and who made no investment in Agency Holding, was the majority stockholder (Tr. 89, 1183-87).

On July 12, 1977, the Immigration and Naturalization Service granted Craig permission to work in this country. Three days later, Craig resigned from Crown Life effective September 1, 1977 (Ex. 3330) and became head of Crown's general agencies in Chicago and Cleveland (Tr. 107-09, Ex. 1151).

2. Pittsburgh

Lloyd and Craig traveled to Pittsburgh in August 1977, and met with the owners of Malley-Duff, Thomas E. Malley and James Duff (Tr. 111, 614). Lloyd first professed dissatisfaction with Malley-Duff's production which had exceeded $5,000,000 in 1976 (Tr. 111-12). He then delivered an ultimatum: Crown Life was either going to establish a new general agent in Pittsburgh or expand the Ehrman Agency; Malley-Duff would be terminated unless it met a production quota (Ex. 7003).

The written quota Lloyd imposed in August 1977, required Malley-Duff to produce $7,500,000 of business by December 10, 1977, the year then in progress (Ex. 7003). Less than four months remained in the fiscal year when plaintiff learned that it had to produce 150% of its busi-

ness from the entire preceding year.[4] To ensure the desired result, Lloyd continued the quota beyond 1977: $10 million in 1978, $15 million in 1979 and $20 million in 1980, an increase of 300%[5] (Ex. 7003).

Given the quota's timing and level, the preordained followed. Malley-Duff's 1977 production exceeded that of 1976 but fell short of the quota. On January 11, 1978, Crown mailed plaintiff a 30-day termination notice (Ex. 7004). Malley-Duff's business was transferred to the Ehrman Agency on February 13, 1978, and plaintiff was driven out of business. Craig and Oglevee then purchased the Ehrman Agency, and the Agency Holding enterprise controlled Crown Life's entire Western Pennsylvania business.

3. Further Expansion of Agency Holding

Having acquired Chicago, Cleveland, Erie and Pittsburgh by February 1978, Lloyd arranged for the conspira-

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[4] Malley-Duff had never had a quota before (Tr. 614), and Crown had never imposed a quota so late into the year to which it applied (Tr. 1143-44). Indeed, Crown had never terminated a general agent producing more than $5,000,000 in business (Tr. 1280). Crown's internal documents disclose the magnitude of Lloyd's quota. *Seventy-eight percent* of Crown Life's United States general agencies failed to produce $7,500,000 in 1977 (Ex. 3446). Malley-Duff's 1977 production placed it in the top third of all of Crown's general agents in the United States, and Pittsburgh was the eleventh largest production area in this country (Tr. 2073).

[5] In addition to the timing and size of the quota, other evidence disclosed that it was a sham designed to eliminate Malley-Duff. Lloyd admitted that he did not expect Malley-Duff to meet the quota. In August 1977, Defendant Oglevee told another general agent that he and Craig would take over Malley-Duff when it was terminated. He and Craig also discussed the obvious fact that their Pittsburgh venture would be more profitable for them if plaintiff was eliminated (Tr. 1193).

tors to be given the Toledo, Ohio and Peoria, Illinois franchises (Tr. 1506). Thereafter, an agency in Minneapolis was terminated by Lloyd and replaced by an Agency Holding subsidiary (Tr. 1508, 1871); two general agents in Colorado were terminated by Lloyd and replaced by an Agency Holding subsidiary (Tr. 129-32); and Crown Life's Phoenix, Arizona general agency was replaced by Agency Holding.

In early 1980, defendants purchased Crown's New Jersey agency despite a moratorium on new territories for Agency Holding imposed by Crown's president (Tr. 2310-11). Lloyd was the only Crown officer who knew of the sale, even though Crown (by Lloyd) guaranteed the purchase price. Shortly thereafter, Lloyd forced the general agent in Hartford, Connecticut to resign and, despite the moratorium, Agency Holding secretly took over its operation (Tr. 1070-75).

In the spring of 1981, growing outcry from the remaining general agents and concern over uncontrolled spending by Lloyd on Agency Holding caused Crown to terminate Lloyd (*See,* Ex. 7012(a)). Lloyd promptly moved to Chicago and took direct command of Agency Holding (Ex. 5032A, Ex. 2850).

4. Unprecedented and Unsecured Financing

Between 1976 and 1981 Lloyd exploited his unfettered control over granting of loans and advances from Crown to general agents in the United States (Tr. 95, 173, 1052-53). When Agency Holding obtained a Crown franchise, Lloyd authorized massive loans and advances that were

unlike any Crown financing before or since (Tr. 1134-35).[6] Millions of dollars were funneled to Agency Holding in this manner.[7]

The "loans" were extraordinary in that: (a) they were unprecedented in amount (Tr. 1133-34); (b) Lloyd handled all such transactions himself, excluding subordinates from their usual roles in reviewing and recommending loans and advances (Tr. 1259-1260); (c) there was no evidence of the purposes of the loans in Crown's files (Tr. 1234-39, Ex. 3656, Ex. 1336); (d) there was little, if any, likelihood of repayment (Tr. 1261); and (e) Crown did not know what use was actually made of the money.

C. Other Acts

Plaintiff's preparation of *Malley-Duff I* met extraordinary resistance. Defendants repeatedly and flagrantly obstructed the orderly administration of justice.

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[6] Crown would advance money to agents to assist in the promotion of Crown's products. Agency Holding mailed false budgets, which Lloyd approved, and thus obtained funds which were distributed to congressional candidates, used to start travel agencies and for the personal benefit of Lloyd and Craig. (Ex. 5043-46). Some money from the "loans" was funneled to Craig in Ontario (Ex. 2850B) and to Lloyd while still at Crown (Ex. 5043-46). At trial Craig first denied passing money to Lloyd, but recanted when confronted with cancelled checks.

[7] Despite its sophistication, Crown could not state how much money had been siphoned off to Agency Holding. A Crown official placed the total debt at between $5,000,000 and $8,000,000 in 1981 (Tr. 1230, 2520-24). Craig, the purported borrower, denied knowing how much he owed Crown (Tr. 163-69), professed ignorance about various large loans (Tr. 181-91, 314) and claimed not to know the use to which the money was put (Tr. 191).

1. The Shredding of Evidence

On May 25, 1978, plaintiff in *Malley-Duff I* filed its first request for production addressed to Agency Holding (Ex. 7022, 7024). The request sought a wide range of documents pertinent to the origin and establishment of Agency Holding and the roles of Craig and Lloyd therein. However, Agency Holding produced only a few routine documents (Ex. 7023, 7025). The reason for the meager response was eventually uncovered. In early June 1978, Craig directed Diane Pariano (Mrs. Craig at the time of trial) to travel from Cleveland to Chicago to "gather" documents. Upon arriving in Chicago, she purchased a paper shredder using cash. Pariano and Craig collected a large number of documents (Tr. 369-70, 961) and instructed a clerk, Miss Beemsterboer, to shred them. When the shredding came to light, Craig put the paper shredder in a public trash barrel in Chicago (Tr. 381-84). He asked Miss Beemsterboer to testify that she could not remember the shredder, but she refused (Tr. 973-74). When Malley-Duff caused a subpoena for Miss Beemsterboer to issue, the United States Marshal in Chicago attempted service, but was told she had left town. In fact, she had been hidden at the instruction of Craig (Tr. 948-54).

2. Attempted Blackmail of the District Judge

In April and May 1979, when Malley-Duff had filed a motion for sanctions in *Malley-Duff I*, defendants embarked on a bizarre plot. They engaged a private detective, Joseph Downey, to investigate the Honorable Hubert I. Teitelbaum, the District Judge assigned to the case (Tr. of May 31, 1979 at 174-78, Craig depo., p. 231-32). Craig and Oglevee met with Downey and instructed him to find

evidence of wrongdoing by the Judge (Tr. of May 31, 1979 at 339, 417). Downey was promised a special bonus if he found any evidence of a wrongful connection between plaintiff's counsel and the Judge or if he got the judge recused (Tr. of May 31, 1979 at 327). Downey fruitlessly pursued his investigation for some weeks then falsely reported that he had followed Judge Teitelbaum to a restaurant where he photographed the Judge dining with Malley-Duff's counsel and a reputed underworld chieftain (Tr. of May 31, 1979 at 178-88).

Defendants pressed Downey for a copy of the photograph. Agency Holding's then lawyer admitted that when he got the photograph, he intended to show it to Judge Teitelbaum in chambers and see what the judge wanted to do about the *Malley-Duff I* case (Tr. of May 31, 1979 at 413-17).

On May 6, 1979, the blackmail plot began to unravel when Craig blurted a statement about the photograph in his deposition (Craig depo. p. 229). Plaintiff then began an investigation and subpoenaed Downey to attend a hearing concerning the shredding of documents. Downey did not appear because his car was blown up and he received a telephoned death threat (Tr. of May 31, 1979 at 166-68, 172). Downey was then arrested on a bench warrant and took the stand in open court where he confessed that his story was fabricated (Tr. of May 31, 1979 at 282-86). Having found no wrongdoing, he invented the story his clients had wanted to hear. Judge Teitelbaum then stayed the civil action, referred the matter to the United States Attorney and reassigned the civil case to another judge.[8]

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[8] The stay was in effect for almost two years. The Complaint also alleges that various defendants suborned and committed perjury, harassed and intimidated other witnesses, and engaged in commercial bribery (A10).

The Complaint seeking redress for the fraudulent and illegal activity was dismissed by the District Court, reinstated by the Court of Appeals for the Third Circuit and now comes before this Court for adjudication.

SUMMARY OF THE ARGUMENT

Civil RICO contains no express statute of limitations. Three possible approaches for filling this gap have been articulated. The most practical solution is to apply to all civil RICO actions the limitations period for the most analogous federal statute, either the Clayton Act or criminal RICO. The adoption of a single national limitations period will avoid needless litigation and choice of law problems and will further the important national objectives of RICO.

The second, and next best approach, is to follow the Court of Appeals below and in each state adopt a uniform period of limitations borrowed from state law. Under this approach, the Court of Appeals' selection of Pennsylvania's six year "catch-all" provision was a wise choice. Pennsylvania has no civil "little" RICO statute, but in states which do, its statute of limitations seems more apt. Since most civil RICO cases involve some type of fraud, the limitation period for fraud is also a fair analogy.

The third approach, the selection in each case of the limitation period applicable to the state cause of action most analogous to the predicate acts alleged in the complaint, is undesirable because it would create much unnecessary litigation. If, however, the Court deems this borrowing approach worthy, Pennsylvania's six-year fraud statute in effect at the time of the underlying events would be most analogous.

Finally, whatever statute of limitations is chosen, it should not be applied retroactively against parties which reasonably relied upon longer statutes. Moreover, if the Court chooses an approach which will cause a two-year statute (or less) to be applied in the present case, the issue of accrual will need to be addressed. In that event, the statute of limitations should not begin to run until a plaintiff knows or should know of his injury and that a RICO cause of action exists. Alternatively, the limitation period should not begin to run until a plaintiff knows or should know of the last overt predicate act relied upon in his complaint. In the present case the issue of accrual, if relevant, is a fact issue for the jury. Most importantly, the Court should avoid imposing a narrow, crippling limitations period or accrual rule contrary to Congressional purposes.

ARGUMENT

I. MALLEY-DUFF'S CLAIM IS NOT BARRED BECAUSE THE STATUTE OF LIMITATIONS FOR ALL CIVIL RICO CLAIMS SHOULD BE THE STATUTE OF LIMITATIONS APPLICABLE TO THE MOST ANALOGOUS FEDERAL STATUTE

Civil RICO contains no express statute of limitations. When a federal statute does not provide a limitations period, courts generally apply or "borrow" the state limitations period applicable to the state cause of action most analogous to the federal statute in question. *United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). Accordingly, most lower courts considering civil RICO claims have routinely borrowed the state limitations period applicable to the state cause of action deemed most analogous to civil RICO. However, borrowing state

statutes of limitations is a matter of expedience, not mandatory law. Given the proper circumstances, federal courts can and should apply the analogous federal limitations period[9] to achieve Congressional objectives and to articulate a uniform national limitations period.[10]

State statutes of limitations should not be absorbed if they discriminate against or undermine national policies or federal rights.[11] *See DelCostello v. International*

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[9] Although most federal courts have applied state limitation periods to civil RICO, their opinions are not persuasive authority on the question of whether to apply federal rather than state law because, with few exceptions, they have focused solely on which state statute to apply without considering the federal option. In the present case, the Court of Appeals considered applying the four-year statute of limitations of the Clayton Act to civil RICO actions, but decided that on balance, the reasons favoring borrowing a uniform federal law were outweighed by opposing considerations. *Malley-Duff*, 792 F.2d at 350, n. 17. However, in a concurring opinion both below and to a *Malley-Duff* companion case, *A. J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330 (3d Cir. 1986), Judge Sloviter concluded that the statute of limitations for civil RICO claims should be the four-year limitations period of the Clayton Act. *Id.* at 341.

[10] Scholarly commentators recommend the uniform adoption of federal law for use with civil RICO. *See* Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009 (1980); Note, *A Uniform Limitations Period for Civil RICO*, 61 Notre Dame L. Rev. 495 (1986); Note, *Civil RICO: A Call For a Uniform Statute of Limitations*, 13 Fordham Urb. L.J. 205 (1985); Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011, 1081 n.329 (1980).

[11] This concept is supported by analogy to the supremacy clause, U.S. Const. Art. VI, cl. 2. Although, technically the supremacy clause only pre-empts state laws which interfere with federal laws and the rights secured by such laws and a statute

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Brotherhood of Teamsters, 462 U.S. 151 (1983); *Occidental Life Insurance Company of California v. Equal Employment Opportunity Commission*, 432 U.S. 355 (1977); *See also Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958). As the Court stated in *DelCostello:*

> In some circumstances, . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law . . . "[T]he court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. 'Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.' "

462 U.S. at 161 (quoting *Occidental Life Ins. Co.*, 432 U.S. at 367).[12]

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of limitations "borrowed" as a rule of decision in federal courts is not operating as a state law of its own force, a federal court should not borrow a state limitations period that conflicts with federal rights for the same reasons justifying pre-emption. *See County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, n.13 (1985); *See also* Special Project, *supra* note 10, at 1045.

12 *See also Barnett v. United Air Lines, Inc.*, 738 F.2d 358, 363 (10th Cir.), *cert. denied*, 469 U.S. 1087 (1984). ("Even when a state statute appears appropriate, if another relevant *federal* statute exists that clearly reflects the interests Congress intended to protect under the federal statute in question, we must apply it") (emphasis in original).

DelCostello held that federal hybrid actions against employers and unions for breach of collective bargaining agreements and the duty of fair representation are governed by the federal limitations period of section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b). This Court reasoned that: (a) the policies underlying the federal law and the practicalities of litigation made application of federal law more appropriate because, among other things, the state limitations period applied by the lower courts was too short to allow plaintiffs to assert their rights; and (b) a federal statute of limitations was available which better accommodated federal interests and provided a better analogy to the underlying action than any state-law parallel. *DelCostello*, 462 U.S. at 166, 169. Similar reasoning suggests use of a federal model in civil RICO.

A. Federal Law Is A More Appropriate Choice

There are numerous reasons why the statute of limitations for civil RICO should be derived from federal law. First, state limitations periods, such as the one recommended by defendants, may be too short to effectuate RICO's policies. A person injured by a single predicate act may not immediately realize that the act is part of a "pattern of racketeering activity".[13] Such realization may well not occur until discovery is commenced in an action on the injury-causing act. If the statute of limitations on the first predicate act is relatively long, a short civil

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[13] To be found liable for a civil RICO violation, a defendant, among other things, must have engaged in a "pattern of racketeering activity," 18 U.S.C. § 1962(c) (1982), which is defined as requiring *at least* two predicate acts of racketeering activity which must occur within ten years of one another. *Id.* § 1961(5).

RICO statute of limitations will unfairly bar many private RICO actions.[14] Furthermore, because RICO offenses are often complex and geographically dispersed and given RICO's criminal nature, a potential litigant may not learn that a pattern of racketeering activity exists until an indictment is returned or other substantial investigation made. *See Creamer v. General Teamsters Local Union 326*, 579 F. Supp. 1284 (D. Del. 1984).

The need for a relatively long limitations period is indicated by the many states which have enacted analogues to civil RICO, the so-called "little" RICOs.[15] Of those states, seven provide a five-year limitations period, one

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[14] For example, at the time Malley-Duff was injured by Defendants' fraudulent activity, the Pennsylvania statute of limitations for fraud was six years. *See A.J. Cunningham Packing Corp.*, 792 F.2d at 337. Nonetheless, defendants would have this Court choose a two-year statute that would bar a RICO action four years before the underlying fraud claim would be barred.

[15] A typical little RICO statute provides in relevant part:

> Any person who is injured in his business or property by reason of any violation of NRS 207.400 [which is analogous to 18 U.S.C. § 1962] has a cause of action against a person causing such injury for three times the actual damages sustained. An injured person may also recover attorney's fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred.

Nev. Rev. Stat. § 207.470 (1985).

Additionally, a "civil action or proceeding under NRS 205.470 may be commenced at any time within 5 years after the violation occurs or after the injured person sustains the injury, whichever is later." *Id.* § 207.520.

a six-year period and two seven years. Only one state has an express limitations period shorter than five years.[16]

A federal limitations period will complement RICO's broad national purpose of eradicating organized crime in a way local law cannot. For example, the RICO violations alleged in the present action deal with injuries and activities spanning many states and many years; situations state legislatures normally do not contemplate when enacting limitations periods for local wrongs. *Cf. Association of Flight Attendants v. Republic Airlines, Inc.*, 797 F.2d 352 (7th Cir. 1986) (A federal statute of limitations applied to an airline's dispute with union as the most appropriate statute for use with a national problem.)

B. There Is An Analogous and Appropriate Federal Statute

RICO is closely analogous to the Clayton Act, 15 U.S.C. § 15, and

> when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practi-

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[16] Ariz. Rev. Stat. Ann. § 13-2314(G) (Supp. 1983) (seven years); Fla. Stat. Ann. §895.05(10) (West Supp. 1983) (five years); Ga. Code Ann. § 16-14-8 (1984) (five years); La. Rev. Stat. Ann. § 15:1356 (West Supp. 1987) (five years); Miss. Code Ann. § 97-43-9 (Supp. 1986) (five years); Nev. Rev. Stat. § 207.520 (1985) (five years); N.D. Cent. Code § 12.1-06.1-05 (1985) (seven years); Ohio Rev. Code Ann. § 2923.34 (Page's Supp. 1985) (five years); Or. Rev. Stat. § 166.725 (1985) (five years); Wash. Rev. Code Ann. § 9A.82.100 (West Supp. 1987) (three years); Wis. Stat. Ann. § 946.87 (West Supp. 1986) (six years). Moreover, those states with a five-year period and Wisconsin provide that if a little RICO criminal prosecution is brought, the limitations period on a little RICO civil action based in whole or part upon any matter complained of in the criminal prosecution is suspended during the pendency of the criminal proceedings and for two years after their termination.

> calities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.

DelCostello, 462 U.S. at 171-72.[17] Even if a "state statute appears 'appropriate', if another relevant *federal* statute exists that clearly reflects the interests Congress intended to protect under the federal statute in question, we must apply it." *Johnson*, 421 U.S. at 462 (emphasis in original).

Civil RICO, like the Clayton Act, provides a remedy for behavior that causes economic injury. Both impose criminal and civil sanctions. Both provide for the civil recovery of treble damages, costs of suit and attorney's fees. *See* 15 U.S.C. § 15; 18 U.S.C. § 1964(c). *See also Electronic Relays (India) PVT Ltd. v. Pascente*, 610 F. Supp. 648 (N.D. Ill. 1985). Both require a plaintiff to prove an injury to his "business or property" by reason of a violation of the substantive statutes. Moreover, analogy to the Clayton Act is particularly compelling because legislative history undeniably shows that RICO was modeled on the federal antitrust laws and that § 1964(c) was specifically modeled on the Clayton Act. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3280-82 (1985).

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[17] As an alternative to the Clayton Act, the Court could adopt the five-year limitations period generally found to be applicable to criminal RICO inasmuch as both criminal and civil RICO are designed to serve the same Congressional purpose of eradicating organized crime. *See United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977); *United States v. Boffa*, 513 F. Supp. 444 (D. Del. 1980). *See also* ABA Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Civil RICO Task Force* 393 (1985), hereinafter referred to as the "Task Force Report"; Note, *Civil RICO: Searching for the Appropriate Statute of Limitations in Actions Under Section 1964(c)*, 14 Loy. U. Chi. L.J. 765, 793-94 (1983).

RICO's legislative history is replete with analogies and references to its antitrust origins. Senator Hruska expressly recognized the similarity between racketeering activity and typical antitrust type activity: "[w]hether a business is purchased from funds derived from its many unlawful activities, or whether it is acquired by extortion and violence, its aim is monopoly." 116 Cong. Rec. 602 (daily ed. Jan. 21, 1970). Senator McClellan, discussing a RICO predecessor, stated:

> because the [antitrust] remedies have been effective in removing and preventing harmful behavior in the business segment of our economy, they show great promise as tools for attacking organized crime. . . . The many references to antitrust cases are necessary because the particular equitable remedies desired have been brought to their greatest development in this field.

115 Cong. Rec. 9567 (1969). *See also* 113 Cong. Rec. 17999 (1967) (Remarks of Sen. Hruska).[18]

More recently, the American Bar Association ("ABA"), Task Force Report, *supra*, extensively chronicled and analyzed RICO's legislative history and concluded that but for the antitrust concepts of standing and proximate cause and the deleterious effect of commingling criminal enforcement goals with the regulation of competition, RICO would have been an amendment to the antitrust laws. *See also* 115 Cong. Rec. 6993 (daily ed. March

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[18] The American Bar Association also stressed the anti-trust model. At House Subcommittee hearings for civil RICO, the President-elect of the ABA strongly endorsed incorporating antitrust "weaponry" in RICO. *Organized Crime Control Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives*, 91st Cong., 2nd Sess. (1970).

20, 1969) (statement of Sen. Hruska). The Task Force Report also concluded that "the flexibility of antitrust type remedies and the liberal procedural rules and devices available under the antitrust laws were intended to be applicable to RICO". Task Force Report at 124.

While RICO was modeled on the antitrust laws, its legislative history is inconclusive as to what statute of limitations Congress intended to be applied. However, given the recent increase in the number of RICO actions, and the unforeseen complexity of determining the appropriate statute of limitations with reference to state law, a federal limitations period is best suited to the practicalities of RICO litigation.

C. Aside from Little RICO Statutes, State Limitations Periods are Inadequate

The lack of an appropriate state law analogy in most states underscores the need to apply a federal limitations period. *See, A.J. Cunningham Packing Corp.*, 792 F.2d at 338-39 (Sloviter, J., concurring).[19] If close state law analogies existed, lower courts would not be so hopelessly divided in attempts to choose analogous state statutes. Defendants' contention that state personal property injury statutes are most analogous to RICO is narrow and simplistic. The Court of Appeals considered and rejected this

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[19] As one commentator noted: "[a]nalogizing to federal periods may be warranted when . . . the federal statute is so complex that even a crude state analogy would be impossible and borrowing of an incompatible state law would impede effective judicial administration of the right. [RICO] might well be an example of such a statute." Special Project, *supra*, note 10, at 1081 n.329.

analogy, *Malley-Duff*, 792 F.2d at 351-352.[20] Moreover, fraud is the most common basis for civil RICO actions. *See Alexander v. Perkin Elmer Corp.*, 729 F.2d 576 (8th Cir. 1984), Task Force Report, *supra*, at 55-58, and in most states, including Pennsylvania, the statute of limitations for fraud is separate from the statute governing injury to property.[21] Moreover, as in the present case, whether injury to intangible property is covered by a state's personal property statute is often subject to great debate and litigation.

RICO's pattern of racketeering activity requirement also makes finding a closely analogous state statute difficult, if not arbitrary. Lower courts have employed two methods to determine which statute to borrow. In the most common approach, each RICO claim is governed by the state limitations periods applicable to the RICO predicate offenses alleged in plaintiff's complaint (the "predicate act approach"). *See Silverberg v. Thomson McKinnon Securities, Inc.*, 787 F.2d 1079 (6th Cir. 1986). The "most analogous" cause of action will often be an arbitrary choice because multiple predicate acts may be covered by different statutes. Moreover, complaints can be manipulated to make predicate acts appear "more analogous" to one type of action than another. Where multi-state conspiracies are involved, forum shopping will be encouraged.

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[20] Crown's argument to the Court of Appeals was substantially the same as its argument to the Court. *See* Crown's Brief at 15-16.

[21] For example, in New York the statute of limitations for fraud is six years, N.Y. Civ. Prac. L. & R. 213 (McKinney Supp. 1987), but the period for injury to property is three years. *Id.* 214. Similarly, Ohio provides a four-year period for fraud, Ohio Rev. Code Ann. § 2305.09 (Page's Supp. 1985), but only three years for injury to personal property. *Id.* § 2305.10.

The second method courts have used to borrow state limitations periods is the "uniform approach," used by the Court of Appeals and modeled upon *Wilson v. Garcia*, 471 U.S. 261 (1985) (holding that all actions brought pursuant to 42 U.S.C. § 1983 are analogous to state causes of action for personal injury). Under the uniform approach, all RICO claims brought in a given state are treated as being analogous to one type of state cause of action. A single state limitations period is then uniformly applied to RICO claims in that state. *See Malley-Duff*, 792 F.2d at 341. The uniform approach is superior to the predicate act approach, *i.e.*, less uncertainty over the statutory period and less waste of judicial resources to determine collateral matters.[22] But as applied to RICO, it is flawed and inferior to the application of a uniform federal limitations period.

The uniform state law approach does not solve many significant issues. For example, if a defendant commits predicate acts in three different states and each state has a different uniform limitations period, plaintiffs could forum shop for the most advantageous limitations period and courts may be forced to unnecessarily consider difficult choice of law problems.[23] Unlike section 1983 actions, where plaintiffs' claims typically arise in a single state,

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[22] These factors, among others, led the court below to hold that the uniform approach should be used for all civil RICO cases brought in the Third Circuit. *Malley-Duff*, 792 F.2d at 353. The benefits of this approach, which is the next best alternative to the application of a federal statute of limitations, are discussed more fully in section II, *infra*.

[23] *See Cope v. Anderson*, 331 U.S. 461 (1947) (In federal question cases, federal courts should absorb state borrowing statutes).

RICO actions tend to cross many state lines making a uniform national statute more practical.

The uniform state law approach will not produce the same practical benefits in RICO actions as it does in section 1983 actions, *i.e.*, collateral litigation concerning choice of law and limitations periods will only be partially curtailed; it will be possible for persons injured by the same conspiracy to be treated differently based upon their residence; and parties will often be unable to determine the applicable limitations period in advance, frustrating one of the principal purposes of limitations statutes. A uniform federal rule on the other hand, "would promote predictability and uniformity" and "would also avoid encumbering the remedial purposes of RICO with an unworkable body of law on the question of which state statute of limitations to apply." *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F.Supp. 673, 684 (N.D. Ind. 1982) (dictum); *See also A.J. Cunningham Packing Corp.*, 792 F.2d at 339-40 (Sloviter, J., concurring).

Because the Clayton Act is more analogous to RICO than any traditional state cause of action and because Congressional purpose would be better served by adopting a uniform federal limitations period, the four-year statute of limitations of the Clayton Act, 15 U.S.C. § 15(b), should be adopted for use with all RICO actions nationwide. Under this approach, Malley-Duff's entire claim was timely.

II. ALTERNATIVELY, MALLEY-DUFF'S CLAIM IS NOT BARRED BECAUSE, AS HELD BY THE COURT OF APPEALS BELOW, RICO ACTIONS IN PENNSYLVANIA SHOULD BE UNIFORMLY GOVERNED BY PENNSYLVANIA'S SIX-YEAR RESIDUARY STATUTE OF LIMITATIONS

If a state limitations period applies to civil RICO, the uniform approach adopted by the court below should be approved. Under the uniform approach, Malley-Duff's claim was timely brought.

The Court of Appeals followed the approach of *Wilson v. Garcia*, 471 U.S. 261 (1985). In *Wilson*, the issue was the proper statute of limitations for 42 U.S.C. § 1983 actions. The Court held that in each state federal courts should uniformly apply to section 1983 claims the statute of limitations applicable to that state's tort action for personal injury. A three-part test was announced for determining the statute of limitations for federal statutes without an express limitation: (1) whether federal or state law governs the characterization of a claim for statute of limitations purposes; (2) if state law applies, whether the claims should be uniformly characterized or evaluated on a case by case basis and; (3) "which state statute provides the most appropriate limiting principle." *Wilson*, 471 U.S. at 268.

Applying *Wilson*, the Court of Appeals held that all civil RICO claims within each state should be characterized uniformly and that the most appropriate limitations period for all civil RICO claims in Pennsylvania is the six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527(6) (Purdon 1981). *Malley-Duff*, 792 F.2d at 353 (A86, 93-96). That decision is the soundest approach un-

der state law and should be affirmed if the Court declines to apply a federal standard.

Uniform absorption of state limitations periods for civil RICO will solve many problems which concerned the Court in *Wilson*. RICO cases currently experience the same "uncertainty, confusion, and lack of uniformity in selecting the applicable statute of limitations"[24] that section 1983 cases did prior to *Wilson*. Like section 1983 claims almost every RICO claim can be analogized to more than one state cause of action, each of which may be governed by a different limitations period. *See Wilson*, 471 U.S. at 272-73. As with section 1983, Congress may not have foreseen the wide range of claims that RICO would embrace.

Congress surely intended the identification of a statute of limitations to be an uncomplicated matter. *See Id.* 471 U.S. at 275. A uniform statute of limitations would further this Congressional goal. A uniform statute would also reduce uncertainty about the proper limitations period and curtail the waste of judicial resources on collateral matters. *See Id.* Thus, the Court of Appeals' application of a statewide uniform statute is consistent with *Wilson* and its underlying policies.

The Court of Appeals' choice of Pennsylvania's six-year residuary statute was also correct.[25] In RICO actions, as in section 1983 actions, analogies to traditional state causes of action "are bound to be imperfect" and "civil RICO is truly *sui generis* . . . particular claims can-

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[24] *Wilson*, 471 U.S. at 272 n.25.

[25] Pennsylvania has no civil "little" RICO statute. In states with such an act, the statute of limitations specified for such actions would be preferred.

not be readily analogized to causes of action known at common law." *Malley-Duff*, 792 F.2d at 347, 353 (A81, 95). For this reason, most courts characterizing RICO broadly have opted for either the limitation for cases arising under a statute or the state catch-all statute.[26] Thus, the Court of Appeals' application of the Pennsylvania residuary statute is reasonable and firmly grounded in precedent.

Although *Wilson* rejected the application of state residuary statutes to section 1983 claims, the Court's reasoning for so doing is inapplicable to the present case. *Wilson* reasoned that:

> The relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitation for statutory claims that were later enacted by many States. Section 1983, of course, is a statute, but it only provides a remedy and does not itself cre-

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[26] *See Durante Brothers and Sons, Inc. v. Flushing National Bank*, 755 F.2d 239 (2d Cir.) *cert. denied*, — U.S. —, 105 S. Ct. 3530 (1985) (applying New York's three-year statute for actions based on statute); *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984) (applying California's three-year statute for actions based on statute); *Teltronics Services, Inc. v. Anaconda-Ericsson, Inc.*, 587 F. Supp. 724 (E.D. N.Y. 1984) *aff'd, In re Teltronics Services, Inc.*, 762 F.2d 185 (2d Cir. 1985) (applying New York's three-year statute); *Victoria Oil Co. v. Lancaster Corp.*, 587 F. Supp. 429 (D. Colo. 1984) (applying Colorado's three-year residuary statute in absence of provision for actions based on statute); *Seawell v. Miller Brewing Co.*, 576 F. Supp. 424 (M.D. N.C. 1983) (applying North Carolina's three-year statute for actions based on statute); *Creamer v. General Teamsters Local Union 326*, 579 F. Supp. 1284 (D. Del. 1984) (applying Delaware's three-year statute for actions based on statute); Task Force Report, *supra*, at 389-90, (specifically approving of cases applying statutes that apply generally to all statutory causes of action that have no express limitations period).

> ate any substantive rights . . . Although a few § 1983 claims are based on statutory rights, . . . most involve much more . . . [t]hese guarantees of liberty are among the rights possessed by every individual in civilized society, and not privileges extended to the people by the legislature [citations omitted].[27]

Unlike section 1983, RICO was enacted long after statutory causes of action and residuary statutes became commonplace. As Judge Higginbotham noted below, it is neither anachronistic nor illogical to reason that Congress would have approved of borrowing such statutes for use with civil RICO. *Malley-Duff*, 792 F.2d at 352 (A94). Further, RICO explicitly enforces statutory rights. Because RICO involves only "privileges extended to the people by the legislature" Congress presumably would approve the use of a limitations period designed for statutory causes of action or, in states such as Pennsylvania, residuary statutes. Also, catch-all statutes are particularly unlikely to discriminate against federal claims, a factor in determining whether a specific limitations period is appropriate. *See Wilson* at 279.[28]

In an effort to confine RICO actions in Pennsylvania to a two-year statute, Defendants urge the Court to adopt a narrow and confining solution by contending that all civil RICO actions nationwide should be uniformly governed by the state limitations period applicable to actions for damage to personal property. Crown Brief at 1415; Agency Holding Brief at 25. This approach is simplistic and un-

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[27] 471 U.S. at 278-79.

[28] Due to the preponderance of fraud issues in RICO cases to date, the limitations period applicable to fraud is another alternative, although it was rejected by the Court of Appeals below.

workable. First, defendants ignore the existence of so-called "little" RICO statutes.[29] The closest analogy to federal civil RICO undeniably will always be the "little" RICO statute.[30] Because fewer than half of the states have civil "little" RICO statutes, however, civil RICO nationwide cannot be uniformly analogous to any one particular type of state law. Any "uniform" characterization of RICO must be done on a state-by-state basis with specific reference to available individual state causes of action. In Pennsylvania, which lacks a civil "little" RICO statute, the Court of Appeals wisely rejected the strained, result-oriented analogy proffered by defendants and found the analogy to the six-year residuary statute most acceptable.

Defendants seek to analogize a complicated broad-ranging federal statute to relatively simplistic, single injury type common law actions which have no relation to RICO. For example, the Pennsylvania statute proffered by defendants as most analogous, 42 Pa. Con. Stat. Ann. § 5524(3) (Purdon 1981), imposes a two-year statute upon:

> (3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.

Section 5524(3), however, is manifestly designed to cover traditional forms of action in which injury is immediately obvious such as trover, replevin, detinue and conversion.

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[29] *See* notes 15-16, *supra*.

[30] In *dicta*, the Third Circuit tacitly recognized this truism when it noted that in states with little RICO statutes, the state limitations period controlling such actions might be an appropriate choice for the federal courts to borrow. *Malley-Duff*, 792 F.2d at 347 n.13 (A82-83).

It is unwarranted to characterize these simple, if venerable, property actions as most analogous to an action involving complex interstate criminal activity. *See* note 19, *supra.*

Indeed, at the time this action arose, fraud, the most common RICO predicate activity, was not covered by § 5524 (3) or any other two-year statute of limitations. *See A.J. Cunningham Packing Corp.*, 792 F.2d at 337. Many predicate acts of racketeering, such as loan sharking, are not governed by two-year statutes of limitations in Pennsylvania. By recommending the use of § 5524(3), the defendants divorce RICO from its racketeering foundation and engage in a procrustean effort to secure a two-year statute of limitations.

III. ALTERNATIVELY, MALLEY-DUFF'S CLAIMS ARE TIMELY UNDER THE PREDICATE ACT APPROACH BECAUSE THE STATUTE OF LIMITATIONS FOR COMMON LAW FRAUD IS SIX YEARS

The Court could adopt the "predicate act" approach for civil RICO and apply the state limitations period applicable to the state cause of action most analogous to the RICO predicate offenses alleged in a plaintiff's complaint. *Wilson* recognized that a case-by-case analysis might be appropriate,[31] and lower courts have frequently used the approach. It is the least practical solution because it " 'is virtually guaranteed to incite complex and expensive litigation over what should be a straightforward matter' ". *Malley-Duff*, 792 F.2d at 348-49 (A85) (quoting Task Force Report at 391-92). As explained by the Court of Appeals, RICO's predicate offenses are so varied and overlapping

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31 *Wilson*, 471 U.S. at 268.

that much fruitless litigation would result from determining the proper analogy in each case. *Id.* at 346-49 (A80-86).

If this Court determines to follow the predicate act approach, Pennsylvania's statute relating to fraud is the most cogent choice. The predicate acts alleged in Malley-Duff's complaint are mail fraud, wire fraud, and obstruction of justice. These acts are most analogous to fraud. This conclusion is supported by numerous federal court decisions which have analogized mail and wire fraud to common law fraud,[32] and in this case, by the courts below. The District Court, for example, expressly found that Malley-Duff's termination claims are most analogous to Pennsylvania's cause of action for common law fraud (A58).[33] The Court of Appeals correctly observed that "the parties agreed that common law fraud was the state cause of action most analogous to these [Plaintiff's] claims" (A76). In fact, fraud so pervades the present case that much of the briefing at the Court of Appeals focused on the dispute over the applicable limitation for common law fraud, which was presumed to cover Malley-Duff's action. *See* Crown brief to the Court of Appeals at 9-15.

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[32] *See Argosy 1981-B, Ltd. v. Bradley,* 628 F.Supp. 1359 (D. Utah 1986); *Kirschner v. Cable/Tel Corp.,* 576 F.Supp. 234 (E.D. Pa. 1983); *D'Iorio v. Adonizio,* 554 F. Supp. 222 (M.D. Pa. 1982).

[33] The District Court mistakenly thought a two-year statute of limitations applied to fraud following the adoption of the Pennsylvania Judicial Code (A58-59). The Court of Appeals later held that a six-year limitations period then governed fraud. *A. J. Cunningham Packing Corp. v. Congress Financial Corp.,* 792 F.2d 330 (3d Cir. 1986).

Defendants, on the other hand, contend that under the predicate act approach, Pennsylvania's two-year statute of limitations for taking, detaining or injuring personal property, title 42, § 5524(3), should apply because "the gravamen of Malley-Duff's Complaint . . . is that its business was injured." (AHC at 17). As noted above, this contention is narrow and strained as it attempts to substitute a general description of injury for an analogy to the type of wrong alleged. Malley-Duff alleged wire fraud, mail fraud and obstruction of justice. "Injury to business" is no more than a generic description of damages applicable to all lawsuits brought by plaintiffs engaged in business. Moreover, section 5524(3) does not cover all injuries to business under Pennsylvania law, and defendants' simplistic solution does not account for the multitude of actions and policy considerations underlying a RICO claim and its predicate acts.[34]

For the above reasons, if the Court follows a "predicate act" approach, it should be concluded that fraud is the most analogous cause of action in Pennsylvania, and apply Pennsylvania's then applicable six-year statute of limitations. *See A. J. Cunningham Packing Corp.*, 792 F.2d at 337.

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[34] Defendants' alternative claim that the predicate acts alleged are most analogous to tortious interference with contract is also unpersuasive. Proof that defendants engaged in wire fraud, mail fraud, conspiracy to blackmail, perjury, suborning perjury, and obstruction of justice is no more related to interference with contract than proof of arson. Additionally, defendants' assertion that Pennsylvania's statute of limitations for property damage encompasses tortious interference with contract is a tenuous interpretation of state law which has not been considered by the Pennsylvania Supreme Court.

IV. REGARDLESS OF WHICH STATUTE OF LIMITATIONS APPLIES, MALLEY-DUFF'S CLAIM IS NOT BARRED

A. When The Applicable Limitations Period Began To Run In The Present Case Is A Material Issue Of Fact That Must Be Resolved At Trial

Whichever statute of limitation applies, this Court should not reverse the judgment of the Court of Appeals and reinstate the District Court's judgment because material questions of fact exist concerning the date on which the statute of limitations began to run.[35] The Court of Appeals did not reach the accrual question because it chose a six-year limitations period. The trial court never considered the accrual of RICO actions because it mistakenly commenced the limitations period from the date of the first injury to Malley-Duff as if plaintiff were suing directly under 18 U.S.C. § 1341.

Federal law controls the date on which statutes of limitations begin to run. *Rawlings v. Ray*, 312 U.S. 96 (1941); *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984). A statute of limitations generally begins to run when a plaintiff knows or has reason to know of the injury forming the basis for his action. *See, e.g., Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *Bankers Trust Co. v. Feldes-*

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[35] In any event, the District Court's judgment should not be reinstated even if the Court concludes that the statute of limitations had run on the injuries caused by defendants' wrongful termination of Malley-Duff. Suit was filed March 20, 1981. Crown concedes that Malley-Duff's RICO claims based upon the obstructions of justice, such as the attempt to blackmail Judge Teitelbaum in May, 1979, are not barred by the statute of limitations. Crown Brief at 30-32. Similarly, Agency Holding seeks reversal of the Court of Appeals judgment only with respect to Malley-Duff's termination in January, 1978.

man, 648 F. Supp. 17 (S.D.N.Y. 1986). The general rule, however, is antagonistic to and incompatible with RICO's statutory framework because injury to a plaintiff may often precede the existence of a cause of action. *Bankers Trust Co. v. Feldesman,* 648 F. Supp. at 35.

RICO differs dramatically from personal injury actions or typical commercial litigation. A RICO plaintiff must be injured by "reason of a violation" of section 1962. 18 U.S.C. § 1964(c). Such violations require a defendant to engage in a "pattern of racketeering activity." 18 U.S.C. §§ 1962(a)-(c). Whatever the precise meaning of "pattern," *see Sedima,* 105 S. Ct. at 3285, n.14, a violation of Section 1962 could not possibly exist absent a pattern consisting of at least two acts of racketeering activity. 18 U.S.C. § 1961(5).[36]

A cause of action simply cannot accrue before one exists. As the Court stated in *Rawlings,* the words "after the cause of action shall accrue" refer to a "complete and present cause of action" so that a plaintiff could enforce liability by suit. 312 U.S. at 98. In the context of RICO, the statute of limitations cannot begin to run until the plaintiff knows or has reason to know of both his

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[36] Agency Holding implies that pursuant to *Sedima,* a plaintiff has a cause of action if he is injured by a single predicate act, even if there is not yet a pattern of racketeering activity. Agency Holding Brief at 31. Not only does this contradict Crown's position, Crown Brief at 23, but it is not true. Even if a plaintiff is injured by only one predicate act, a pattern of racketeering activity must still exist. *Sedima,* 105 S. Ct. at 3285. Moreover, Agency Holding ignores claims under §§ 1962(a), 1962(b) and 1962(c).

injury and the existence of a pattern of racketeering activity.[37]

The contrary result advocated by defendants is nonsensical and would often render civil RICO useless. If an actor commits numerous related predicate acts separated by a time period greater than the statute of limitations, and the bulk of the total damage is caused by the first predicate act, a plaintiff injured by that act would lose his right to a RICO claim. The defendant, like a biting dog, would be given a "free" first crime, and the Congressional purpose of eradicating organized crime would be frustrated. Moreover, given that Congress expressly provided that RICO is to "be liberally construed to effectuate its remedial purposes," *Sedima*, 105 S. Ct. at 3286, and that a RICO claim can be based on predicate acts ten years apart, it would be incongruous to suppose that Congress intended that injury caused by a first act be noncompensable since a plaintiff cannot bring a RICO claim before a pattern exists.[38]

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[37] *See* Washington's little RICO, Wash. Rev. Code Ann. § 9A.82.100 (West Supp. 1987), which provides that civil proceedings must be initiated within three years after a pattern of criminal activity is discovered or should have been discovered.

[38] This issue is related to defendants' argument that Malley-Duff does not state a RICO cause of action for its termination injuries because at the time the injuries were incurred defendants had committed only one predicate act. Crown Brief at 19-25. In light of the fact that the predicate acts constituting a pattern can be as many as ten years apart, defendants' argument, which is unsupported in law, is absurd. If a person is injured by an act which is later determined to be the first in a series of predicate acts constituting a pattern of racketeering activity, to deny that person compensation would be contrary to the purposes of RICO.

This problem has been recognized by many state legislatures which have enacted "little" RICO statutes. These statutes provide that the running of the limitations period on a state civil RICO action shall be suspended during the pendency of a criminal prosecution and for two years thereafter, when the civil cause of action is based in whole or part upon any matter complained of in the criminal prosecution.[39] Some states have gone even further to insure that claims are not prematurely barred. Nevada expressly provides that the statutory period does not begin to run until after violation occurs, or the injury is sustained, whichever is later, and Arizona and North Dakota provide that there must be actual discovery of a violation. Nev. Rev. Stat. § 207.520; Ariz. Rev. Stat. Ann. § 13-2314; N.D. Cent. Code § 12.1-06.1-05.

As previously stated, material issues of fact exist concerning when Malley-Duff knew or should have known about defendants' pattern of racketeering activity; issues which have not been addressed by either of the lower courts. That these issues must be determined by a fact-finder is clear, precluding summary judgment. Much of the evidence regarding defendants' obstructions of justice is circumstantial and defendants' pattern of illegal acquisitions and other activities became clear only when viewed in its entirety. Similarly, material issues of fact exist concerning when Malley-Duff knew or should have known that defendants' discovery techniques were criminal and not just objectionable and unprofessional. Even if the Court should adopt an approach to choosing a statute of limitations that results in a short period, this case

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[39] *See* note 16, *supra*.

should be remanded for consideration of the accrual issues at trial.

B. Alternatively, The Limitations Period For Civil RICO Should Not Begin To Run Until A Plaintiff Knows Or Should Know Of The Commission Of The Last Overt Act

The statute of limitations should not begin to run until the commission of the last overt act in a pattern of racketeering activity. The statute of limitations normally begins to run from the date of each injury. Instead of applying the general rule to a statute for which it is ill-suited, the accrual of civil RICO claims should be governed by the usual rule for situations involving continuity: the statute of limitations should not begin to run until the plaintiff knows or has reason to know of the injury from the last predicate act on which he relies (the "last overt act rule"). *See Bankers Trust v. Feldsman; see also United States v. Davis*, 576 F.2d 1065 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978); *United States v. Boffa*, 513 F. Supp. 444 (D. Del. 1980).[40]

Under the last overt act rule, an action is timely as long as the last act committed falls within the limitation period. Relief is then granted with respect to earlier re-

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[40] Defendants cite *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), for the proposition that in a continuing antitrust conspiracy a cause of action accrues at the time of each injury, and, therefore, Malley-Duff's RICO injuries based on fraud are barred by a two-year statute. Defendants' analogy to *Zenith* is flawed, however, because *Zenith* assumes that a cause of action exists at the time of injury. In the present case, no civil RICO cause of action may have existed at the time defendants committed the first predicate act which injured Malley-Duff.

lated acts that would otherwise be barred by the general rule. *Bankers Trust Co.*, 648 F. Supp. at 36. *See also White v. Bloom*, 621 F.2d 276 (8th Cir.), *cert. denied*, 449 U.S. 995 (1980), 449 U.S. 1089 (1981).

This rule is particularly well suited to civil RICO, and has been utilized by the more thoughtful courts. *See Bankers Trust Co., supra; County of Cook v. Berger*, No. 83 C 3401 (N.D. Ill. 1986) (available on Westlaw ALL-FEDS data base). RICO requires continuity. A plaintiff cannot sue until the defendant has committed at least two predicate acts and there must be a *"factor of continuity plus relationship"* between them. *Sedima*, 105 S. Ct. at 3285 n. 14. As held in *County of Cook, supra:*

> Of necessity, each predicate act brings some harm to a plaintiff, whether directly or as part of a course of conduct. Given the nature of the federal interest in providing relief to those who are injured by a course of continual and related conduct, it would be incongruous to bar, on statute of limitations grounds, recovery for predicate acts taking place outside the limitations period and permitting recovery only for those within the limitations period. The principles of conspiracy law ought clearly to apply, and so long as any of the predicate acts occur within the limitations period, a defendant should have to answer for all of his related and continual acts of harm.

See also United States v. Boffa, 513 F. Supp. 444, 480 (D. Del. 1980) (applying the last overt act rule in a criminal RICO context). Accordingly, civil RICO actions should not accrue until the occurrence of the last overt

act which injures the plaintiff. Since overt acts continued at least into 1981, Malley-Duff's action was timely.

Finally, if the Court's decision regarding the appropriate limitations period and accrual rules for civil RICO would bar Malley-Duff's claim, the decision should be given only prospective application. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court identified three factors governing retroactive application of changes in law relating to limitations of action. First, for the decision to be applied nonretroactively, it must have established a new principle of law. Second, the prior history of the rule must be considered to determine whether retrospective operation will further or retard its application. Third, the inequity resulting from retroactive application must be considered.

The Court of Appeals for the Third Circuit has held that *Wilson v. Garcia, supra*, should not be applied retroactively under the *Chevron Oil* standards. *Brown v. Foley*, No. 86-5389 (3d Cir. Jan. 26, 1987); *Pratt v. Thornburgh*, 807 F.2d 355 (3d Cir. 1986). When this case was commenced in March, 1981, no court had held that the Pennsylvania statute of limitations for fraud, the most analogous state law claim, was two years. At that time, the only relevant decision held that the statute of limitations continued to be six years,[41] and the Court of Appeals has since reaffirmed that principle. *A. J. Cunningham Packing Corp., supra.* Applying *Wilson* prospectively in the

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[41] *Culbreth v. Simone*, 511 F. Supp. 906 (E.D. Pa. 1981); *see also* Fiebach & Doret, *A Quarter Century Later—The Period of Limitations for Rule 10b-5 Damage Actions in Federal Courts Sitting in Pennsylvania*, 25 Vill. L. Rev. 851, 855-56 n.26 (1980).

RICO context will not adversely affect its operation to appropriate cases. However, retroactive application would inequitably penalize plaintiffs in many pending cases which were instituted in reasonable reliance upon then existing law. If the Court's decision would result in the borrowing of a short time limitation under state law, the decision should be given only prospective application pursuant to *Chevron Oil Co., supra.*

CONCLUSION

For the above reasons, plaintiff, Malley-Duff & Associates, Inc. respectfully requests that the judgment of the Court of Appeals for the Third Circuit be affirmed and that this case be remanded to the United States District Court for the Western District of Pennsylvania for trial.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1986

AGENCY HOLDING CORPORATION, ET AL.,
Petitioners
vs.
MALLEY-DUFF & ASSOCIATES, INC.
Respondent

CROWN LIFE INSURANCE COMPANY, ET AL.,
Petitioners
vs.
MALLEY-DUFF & ASSOCIATES, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS CROWN LIFE INSURANCE COMPANY AND CLARKE BURTON LLOYD

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Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009 (1980) 6

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Fiebach & Doret, *A Quarter Century Later—The Period of Limitations for Rule 10b-5 Damage Actions in Federal Courts Sitting in Pennsylvania*, 25 Vill. L. Rev. 851 (1980) 12

Note, *Civil RICO: A Call For a Uniform Statute of Limitations*, 13 Fordham Urb. L. J. 205 (1985) 6

Note, *Civil RICO: Searching for the Appropriate Statute of Limitations in Actions Under Section 1964(c)*, 14 Loy. U. Chi. L.J. 765 (1983) 6

Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011 (1980) 6

STATEMENT OF THE CASE

In its Statement of the Case as well as in its Statement of the Facts the respondent uses argumentative and conclusory adverbs and adjectives in an effort, as it did below, to color the Court's approach to this case. For example, it alleges that certain "conspirators" used various Crown Life Insurance Company* agencies to divert vast sums of money from defendant Crown Life. Needless to say, even RICO does not give a cause of action to a plaintiff against a defendant because of sums allegedly diverted from that defendant.

The respondent also mixes its references to "Craig and the Agency Holding Defendants" with the term "defendants." This mixing together may lead the Court to believe that Crown Life and Clarke Burton Lloyd had knowledge of the alleged activities of Kerry Craig's then attorney (now deceased) and Craig.

Respondent well knows that neither Crown Life nor Lloyd had any prior knowledge of the use of a shredding machine at the Chicago office of Agency Holding. The trial judge so instructed the jury at the end of the five-week trial of *Malley-Duff I.* (Tr. 3264). Nor did they have any knowledge that a private detective had been engaged by Craig or his then attorney until that information was disclosed by Craig at his deposition. (Sanctions hearing, June 1, 1979, p. 454). At the conclusion of the sanctions hearing initiated by the respondent prior to the filing of the complaint in this case, the District Judge acknowledged that there was no indication that the attorneys for Crown Life and Lloyd had any involvement at all in hiring the private detective. (Sanctions hearing, June 5, 1979, p. 696).

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*Rule 28.1 information was supplied in Petitioners' principal brief.

STATEMENT OF THE FACTS

Many of the respondent's conclusory statements for which reference is made to the trial transcript and exhibits submitted at trial are not supported by the record. Two of the classic misstatements are contained on the first page of the Statement of the Facts. In the first misstatement the respondent says that Agency Holding Corporation was controlled directly by Lloyd. Respondent cites as authority exhibit 5008. This exhibit, an internal Crown Life correspondence concerning the procedure for approval of loans to agencies, contains no reference to Agency Holding. By a letter to the clerk of this Court dated April 8, 1987, counsel for respondent states that the reference to the exhibit was a typographical error. He does not, however, supply a correct or substitute reference to support the misstatement. Lloyd has never owned any stock of Agency Holding. Craig, who has owned 100% of the stock of Agency Holding since he started to work there in 1977, gave Lloyd a job in September, 1981, but fired him in January, 1983. Lloyd has had no employment or other relationship with Agency Holding since January, 1983.

In the second paragraph of the Statement of Facts, respondent states: "Until 1981, Crown vested him (Lloyd) with complete power to appoint and terminate General Agents." The transcript references cited for that quote are transcript 95, 172-73, and 1242-43. The first two references contain no statements concerning Mr. Lloyd's alleged power to terminate General Agents. On Tr. 1242, an employee of Crown Life states, "He had the authority to recommend termination of General Agents. I don't know if he had the power to actually put it into action." The testimony in *Malley-Duff I* was clear that Michael Hutchison, Lloyd's superior, had the power to terminate and that

Lloyd could only recommend. (Tr. 2679.) These two misstatements on the first page of the Statement of the Facts are an indication of the inaccuracies contained in the respondent's Statement of the Facts in an effort to paint a picture that is contrary to reality.

ARGUMENT

I. This Court Should Adopt A Simple Approach To Selecting The One Most Appropriate Statute Of Limitations For All Civil RICO Claims In Each State.

The respondent's brief criticizes the approach recommended by petitioners by saying: "Defendants' contention that the state personal property injury statutes are most analogous to RICO is narrow and simplistic." Page 20. Later it says: "This approach is simplistic and unworkable." Page 27-28.

This Court has not rejected a solution to a problem just because the solution is simple and uncomplicated: "In this light, practical considerations help to explain why a *simple*, broad characterization of all § 1983 claims best fits the statute's remedial purpose." *Wilson v. Garcia*, 471 U.S. 261, 272 (1985) (emphasis supplied). "The *simplicity* of the admonition in § 1988 is consistent with the assumption that Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever increasing litigation." *Id.* at 275. (Emphasis supplied.) "The federal interests in uniformity, certainty and the minimization of unnecessary litigation all support the conclusion that Congress favored this *simple* approach." *Id.* (Emphasis supplied.)

In *Wilson* this Court stated, "Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized § 1983 as conferring a general remedy for injuries to personal rights." *Id.* at 278. The 91st Congress expressly conferred on private RICO plaintiffs a general remedy for injuries to business or property. 18 U.S.C. § 1964(c).

Applying the statute of limitations for injury to business or property in each state would create uniformity in each state and would be easy to apply. Respondent and HMK Corporation, amicus curiae in support of the respondent, point out that the activities creating a RICO cause of action may not necessarily take place in a single state. They point out, for instance, that the alleged activities in this case took place in Chicago, Illinois, Cleveland, Ohio, and other states. What they ignore, however, is that the injury took place in only one state, and it is the injury to business or property for which a cause of action was given, not the activities that formed the pattern.

The petitioners' approach will not result in any more forum shopping than would be involved with a federal statute of limitations, because prudent counsel would still have to consider bringing the RICO claim in a state with a limitations period that will support claimants' common law claims for injury to their business or property.

Respondent also rejects the solution proposed by the petitioners because it says that in many states there are specific statutes that differ based upon the type of injury to a person's business or property and points out that the statute of limitations for a business injury caused by fraud could be different from the general statute for injury to personal or real property or business. Page 21. This view emphasizes looking at the cause of the injury rather than

the nature of the injury or interest being protected, and it is the very view that was rejected by this Court in *Wilson*, where this Court said, "This § 1983 claim is arguably analogous to distinct state tort claims for false arrest, assault and battery, or personal injuries." *Id.* at 273. The Court then went on to hold that all § 1983 claims, regardless of how the injury occurred, would be best characterized as personal injury actions. *Id.* at 276, 277, 280.

In many states the general statute of limitations for injury to personal rights is different from the statute of limitations for such specific torts as assault, battery, false imprisonment, libel or slander. For example, in Arizona the statute of limitations for injuries done to another is two years, Ariz. Rev. Stat. Ann. § 12-542 (1978 and Supp. 1986-87), whereas the statute of limitations, for false imprisonment, libel and slander is one year. Ariz. Rev. Stat. Ann. § 12-541 (1978 and Supp. 1986-7). In Nebraska the statute of limitations for injury to the rights of the plaintiff not arising in contract or otherwise enumerated is four years, Neb. Rev. Stat. § 25-207 (1985), whereas the statute of limitations for false imprisonment, assault and battery, libel and slander is one year. Neb. Rev. Stat. § 25-208 (1985). In New Jersey there is a two-year statute for injury to the person by wrongful act, N.J. Stat. Ann. § 2A: 14-2 (West 1982 and Supp. 1986), but a one-year statute for libel and slander. N.J. Stat. Ann. § 2A: 14-3 (West 1982 and Supp. 1986). In Virginia there is a two-year statute for personal injury, Va. Code Ann. § 8.01-243 (1984 and Supp. 1986), and a one-year statute for libel, slander and malicious prosecution. Va. Code Ann. § 8.01-248 (1984 and Supp. 1986). These are but a few of the examples which

point out that the simple solution proposed by the petitioners is analogous to the solution to the § 1983 statute of limitations problem provided by this Court in *Wilson.*

II. A Federal Statute Of Limitations Should Not Be Adopted Because The State Statutes Of Limitations Would Not Frustrate The Federal Purpose Of RICO.

The respondent, and amici curiae who submitted briefs in support of the respondent, appear to focus their arguments on their contention that this Court should legislate a four-year statute of limitations for all civil RICO claims. They cite several law review articles in support of their position. Most of these articles, however, were written prior to *Wilson*, and many of the problems raised in the articles would be resolved by a simple approach following the *Wilson* example.[1] Furthermore, some of the articles acknowledge that it should be left to the Congress to enact a federal statute of limitations.[2] This Court has on other occasions questioned the wisdom of the breadth of the RICO remedy, but has said that a narrowing of that scope is to be done by Congress and not the Court. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3287 (1985). Similarly, enacting a specific federal statute of limitations for all private RICO causes of action is the responsibility of the Congress, rather than this Court, when the statute of limitations provided by the states for injuries to

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[1]Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011 (1980); Note *Civil RICO: A Call For a Uniform Statute of Limitations*, 13 Fordham Urb. L. J. 205 (1985); Note, *Civil RICO: Searching for the Appropriate Statute of Limitations in Actions under Section 1964(c)*, 14 Loy. U. Chi. L. J. 765 (1983).

[2]ABA Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Civil RICO task Force* (1985); Special Project, *supra*, n. 1, at 1043-45, 1105.

property or business are not inconsistent with the purposes of RICO. Pennsylvania's two-year statute of limitations for injury to business or property will not frustrate or interfere with the implementation of any national policy.

A. *Legislative History.*

The first proposals to Congress for RICO-type legislation were made in the 90th Congress. Bill S.2048 would have amended the Sherman Act, 15 U.S.C. § 1, to prohibit the investment of unreported income in interstate business. As an amendment to the antitrust laws, the four-year statute of limitations enacted in 1955 would have been applicable. Bill S.2049 prohibited investments in interstate business with funds derived from listed criminal activities. It explicitly provided a four-year statute of limitations for civil actions. No action was taken on S.2048 or S.2049. They were later consolidated in an independent bill and reintroduced in the 91st Congress as Bill S.1623 in March, 1969. The suggested civil action provisions of that bill were accompanied by a four-year statute of limitations. After initial committee hearings, Bill S.1861 was introduced refining S.1623. S.1861 deleted the provision for private civil remedies and the accompanying statute of limitations. Bill S.30, containing RICO, followed S.1861 and was passed by the Senate with no provision for private civil remedies.

The House Committee on the Judiciary added private civil remedies to S.30. Bill H.R.19586 was identical to the Senate version of S.30 in relevant parts but provided for private civil actions. It did not contain a statute of limitations. Bill H.R.19215 paralleled H.R.19586 and also contained a statute of limitations. The House Committee on the Judiciary passed over H.R.19215 and chose the language of H.R.19586, providing private civil actions but no

statute of limitations. A floor amendment to provide a statute of limitations and other provisions was offered by Representative Steiger but was withdrawn. The Senate did not again specifically consider whether to include a statute of limitations, but concurred with the House's version of S.30, which, in October, 1970, became the RICO statute as we know it.

In the 92d Congress, Senators McClellan and Hruska introduced Bill S.16. S.16 would have amended RICO by providing a *five*-year statute of limitations and other civil remedies. The Senate passed S.16 but the House refused to consider it. In the 93d Congress, Bill S.13, which was identical to S.16, passed the Senate by a voice vote, but it, too, received no House consideration.

The Clayton Act, 15 U.S.C. § 15, was in existence for almost 40 years before the Congress enacted a specific statute of limitations. Congress may well have wanted time to tell how RICO would in fact develop before enacting a specific statute of limitations.

After several years of experience with RICO, and particularly civil RICO, bills to amend RICO, Bills H.R.5445 and S.2907, were introduced in the House of Representatives and the Senate last fall in the final days of the 99th Congress. H.R.5445 was revised to contain, among other amendments, a three-year statute of limitations, and to eliminate the treble damage provision except for defendants who had been previously convicted of the predicate acts or a violation of § 1962. It was passed by the House of Representatives (371-28 vote) on October 7, 1986. An effort by Senator Metzenbaum to attach S.2907, which was almost identical to H.R.5445, to a stop-gap funding bill was blocked by a procedural move on October 17 by a vote of 47-44.

B. *History of Private Civil RICO.*

Although the legislative history set forth above may not be sufficient to state that the Senate and the House of Representatives have specifically rejected a four-year statute of limitations for private civil RICO actions, it must be agreed that the Congress did not include private civil RICO actions as an amendment to the antitrust laws, as was originally proposed. Apparently the Congress did not want to encumber the RICO act with certain excess "baggage," such as its standing requirements and the "antitrust type injury" requirement.

It is well that the Congress waited to see how RICO would be interpreted before considering a statute of limitations. Until the *Sedima* case some Courts were requiring a "racketeering injury." Since that case, it is clear that, if a defendant engages in a pattern of racketeering activity in a manner forbidden by § 1962(c) of the Act, a plaintiff can receive damages for injury caused by a predicate act. Such injuries are often closely akin to the injuries for which state laws grant a cause of action. A RICO predicate act injury is not even superficially similar to the "antitrust type" injury required by the antitrust laws.

The Congress had over 16 years of experience with the operation of private civil RICO when the House of Representatives passed H.R.5445. Although the respondent and amici have stated that the purpose of the civil RICO private right of action was to "eradicate organized crime," the House of Representatives, in eliminating treble damages except in the case of a prior criminal conviction, recognized that private civil RICO was being used in a manner not intended by the original sponsors and, in fact, was not being used to "eradicate organized crime." Utilizing Lexis as a tool, we have fed the names of the defendants in every

reported criminal RICO action into the Lexis bank (352 cases; 1,326 defendant names) in an attempt to determine if any of these defendants were subsequently named in a civil RICO case. In addition, a Lexis search of reported civil RICO cases was conducted in an attempt to determine in how many of these there are references to prior criminal RICO convictions of the civil RICO defendants. We have found that of the 449 reported civil RICO cases, in only five cases were there civil RICO defendants who had been previously named as a defendant in a reported criminal RICO action or convicted of a criminal RICO violation.[3] In none of these cases, with the possible exception of *Anderson*, were the defendants members of what would normally be called "organized crime." It is folly for the respondent to argue that civil RICO should have a long statute of limitations because its purpose is to "eradicate organized crime."

III. The Respondent Has Admitted That It Had No Civil RICO Cause Of Action When Its Agency Agreement Was Terminated.

As was set forth in our principal brief at pages 21 and 22, the respondent admitted in its brief to the Third Circuit that it had no RICO cause of action when the petitioner Crown Life terminated the respondent. In its brief

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[3]*Cullen v. Nassau County Republican Committee*, No. 86-7066 (2d Cir. February 2, 1987) (Available on Lexis; Genfed, Courts) (Macing of county and town employees); *Village of Fox Lake, Illinois v. Waste Management of Illinois, Inc.*, No. 86-C-4888 (N.D. Ill. March 2, 1987) (Available on Lexis; Genfed, Courts) (Bribery of elected officials to obtain garbage contract); *County of Cook v. Lynch*, 648 F. Supp. 738 (N.D. Ill. 1986) (Bribery of officials); *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633 (D. Alaska 1982) (Bribery of municipal employees in bid-rigging scheme); *Anderson v. Janovich*, 543 F. Supp. 1124 (W.D. Wash. 1982) (Conspiracy to control the tavern business in Pierce County, Washington).

to this Court, the respondent again states, "A cause of action simply cannot accrue before one exists." Page 33.

The respondent argues that the petitioners want to be given a "free first crime" and to do so would frustrate the Congressional purpose of "eradicating organized crime." Page 34. As was set forth above, it is clear that over the 16 years of its existence civil RICO has not been used by private citizens to "eradicate organized crime." The respondent well knows that if it has a legitimate non-RICO cause of action for the so-called "free first crime," it can obtain civil relief.

But of course there is no "free" first bite if there was a conspiracy to violate RICO in existence at the time the plaintiff was injured. Although we made that argument in our principal brief, the respondent at no place in its brief answered our contention that a plaintiff would have a cause of action under § 1962(d) if a conspiracy to commit the pattern of racketeering activities alleged existed at the time of its termination. By stating that it had no cause of action when it was terminated, it has admitted that there was no RICO conspiracy in existence at that time, even though in its complaint it had alleged that defendant Agency Holding Corporation had been appointed as the Crown Life General Agent in Chicago and Cleveland prior to the termination of the respondent. If the alleged RICO conspiracy came into existence at some later date, that ought not to give the respondent a cause of action under § 1962(d) for an injury that took place before the alleged conspiracy began.

A holding, that there is no RICO cause of action for a plaintiff who admits that no cause of action had accrued at the time of his alleged injury, would not permit a "free first

crime" for defendants who had already conspired to commit a pattern of racketeering activity because a cause of action under § 1962(d) in that case accrued at the time of injury. Respondent, however, after having taken extensive discovery and gone through a five-week trial involving most of the same conduct, now insists that it had no cause of action for conspiracy under § 1962(d) or any other subsection of 1962 when it was terminated.

IV. No Reason Exists For Refusing To Apply To The Parties In This Case This Court's Decision As To The Appropriate Limitation Period For Civil RICO Cases.

There is no reason why a decision in this case establishing a method for determining the appropriate statute of limitations for a civil RICO action should not apply to the parties in this case. There has been no line of established cases, upon which any plaintiff or defendant could have relied, that would be overturned by this Court's decision. Respondent points to the fact that at the time it filed its cause of action there was a single district court decision that said that the statute of limitations for fraud in Pennsylvania was six years. Page 38. He could not have relied on that case for not filing prior to February 11, 1980, the expiration of two years after respondent's agency contract was terminated, because it was not decided until 1981. The law review article, cited by respondent in Footnote 41 of its brief as further support for his reliance argument, was published in September, 1980, over six months before the complaint was filed, but eighteen months after February, 1980. In addition, the article states:

> "Although the authors believe that the new six-year 'catch all' limitation period, 42 Pa. Cons. Stat. Ann. § 5527(6) (Purdon 1979), would continue to govern actions in fraud, the matter is not entirely free from

> doubt as the statute is strangely ambiguous and too little time has elapsed since its enactment to have an appellate decision resolving the issue."

Fiebach & Doret, *A Quarter Century Later—The Period of Limitations for Rule 10b-5 Damage Actions in Federal Courts Sitting in Pennsylvania*, 25 Vill. L. Rev. 851, 855 n.26 (1980).

Thus, even the authority relied on by the respondent could not have caused it to be misled. Furthermore, as was pointed out in our principal brief, this is not a fraud case, but an alleged malicious interference with contract claim, and for that the period is two years.

Although the Third Circuit held in *A. J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 337 (3rd Cir. 1986), that the statute of limitations for common law fraud claims in Pennsylvania was six years, a subsequent Pennsylvania Superior Court decision has stated that fraud claims at the relevant time are governed by the two-year statute of limitations. In *Bender v. McIlhattan*, 520 A.2d 37 (Pa. Super. Ct. 1987), the Superior Court referred favorably to *Bickell v. Stein*, 291 Pa. Super. 145, 435 A.2d 610 (1981), which held that the statute of limitations for fraud and tortious interference with contract at the relevant time is two years. 42 Pa. Cons. Stat. Ann. § 5524 (3) and (4) (Purdon 1981). Although it was cited, *Bickell's* holding was ignored by the Third Circuit in *A. J. Cunningham, supra.* In addition, *Bender* cited *Fickinger v. C. I. Planning Corp.*, 556 F. Supp. 434 (E.D. Pa. 1982), which agreed with the holding of *Bickell* that the statute of limitations for fraud is two years. The *Bender* Court concluded that a subsequent amendment that specifically placed "deceit and fraud" under the two-year statute was "designed as a 'catch basin,' and with the intention of

'preventing judicial interpretation that would be contrary to legislative intent.'" *Id.*

Because the Pennsylvania Superior Court has twice gone on record that actions based on fraud during the relevant period are governed by § 5524(3), a two-year statute of limitations, there is nothing inequitable in the Court's holding in this case being applied to a party such as the respondent.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the judgment of the United States Court of Appeals for the Third Circuit be reversed with instructions that the petitioners' Motion for Summary Judgment on respondent's RICO claim for termination injuries be granted.

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FOR ARGUMENT

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Nos. 86-497 and 86-531

In the Supreme Court of the United States

October Term, 1986

AGENCY HOLDING CORPORATION, *et al.*,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

CROWN LIFE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS IN NO. 86-497

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ARGUMENT

I. Respondent Malley-Duff Has No RICO Cause Of Action For The Termination Of Its Agency Contract Because This Alleged Injury Was Not Caused "By Reason Of" A RICO Violation.

Malley-Duff argued in the circuit court[1] and admits in its brief to this Court[2] that when its agency contract was terminated no pattern of racketeering activity had been committed by defendants. It follows that Malley-Duff does not have a RICO cause of action for its termination injury because this injury was not "by reason of" a RICO violation. 18 U.S.C. §1964(c). Malley-Duff may have other causes of action for its termination, and in fact has alleged many,[3] but it does not have a RICO cause of action.

In *Sedima, S.P.R.L. v. Imrex Company, Inc.*, ____ U.S. ____, 105 S. Ct. 3275 (1985), this Court rejected the dissenting Justices' position that a RICO plaintiff must be able to prove a "racketeering" injury causally traceable to a confluence of the elements of a RICO violation, but the Court preserved the requirement that a RICO plaintiff must be able to causally trace its injury to an existing RICO violation. The *Sedima* majority held that:

> [T]he plaintiff only has standing if, and can only recover [under RICO] to the extent that, he has been

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[1]Malley-Duff's Brief in the Third Circuit, pp. 32-34.

[2]Malley-Duff's Brief, p. 34, n.38.

[3]*I.e.*, antitrust, breach of contract, tortious interference, common law conspiracy to tortiously interfere. Plaintiff may even have had a RICO conspiracy action under §1962(d). Any such RICO conspiracy action for the termination of plaintiff's agency contract is barred by the appropriate two-year Pennsylvania statute of limitations. See our principal brief at pp. 15-29 and 35-36.

> injured in his business or property *by the conduct constituting the violation.* As the Seventh Circuit has stated, '[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct' . . . .

105 S. Ct. at 3285-86 (citation omitted: emphasis added).

The fundamental division between the majority and the dissenting Justices in *Sedima* was that the majority felt that RICO was intended to provide a RICO cause of action for plaintiffs whose injuries were "proximately caused by the [conduct] forbidden" by RICO, and not just for plaintiffs whose injuries indirectly flowed therefrom. 105 S. Ct. at 3286, n.15. There was no disagreement between the majority and the dissent that all RICO plaintiffs must be able to prove that their injuries were caused by a RICO violation. This is what Malley-Duff has admitted that it is unable to do with respect to its termination injury.

Malley-Duff argues that its termination injury was caused by a RICO predicate offense, and that predicate offenses which occurred later established a pattern. As the *Sedima* majority makes clear, this is not enough to give Malley-Duff a RICO action for its termination; committing a predicate offense is not a RICO violation:

> Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of §1962, *nor is mere commission* of the predicate offenses.

105 S. Ct. at 3285 (emphasis added).

> A violation of §1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Id. (footnote omitted).

> [P]laintiff has standing if, and can only recover (under RICO) to the extent that, he has been injured in his business or property *by the conduct constituting the violation.*

Id. at 3285-86 (emphasis added).

Sedima held that a plaintiff who can causally trace its injury directly to a predicate offense which is part of an existing, completed RICO violation, or indirectly to a confluence of RICO's elements, can recover under RICO.

A plaintiff, like Malley-Duff, who cannot causally trace its injury to an existing RICO violation has no RICO action. This is so because causation, as we stated in our brief to the Third Circuit, is a time-bound concept. Something that occurs after an event can never be said to have caused it. Something that occurs after a plaintiff is injured can never be said to have *caused* the injury. A plaintiff injured by a RICO predicate act before a pattern of such activity has occurred will never be able to contend that he has been injured in his business or property "by reason of" a substantive RICO violation. There is simply no way for a plaintiff who cannot prove the existence of a completed RICO violation as of the time it was injured to causally trace its injury to a substantive *RICO violation.* Any other construction would effectively read the "by reason of" language out of the RICO statute or eliminate any causal significance which the phrase was obviously intended to have. We have found no interpretation of a federal statute containing "by reason of" language that does not equate this "plain language"[4] to a causation requirement.[5]

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[4] *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 (1982).

[5] *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-36 (1983) ("There is a

(Continued on next page)

Any other construction would also be discordant with Congress' purpose in enacting RICO. Congress' purpose in the RICO statute was to attack organized crime. The threat to society posed by organized crime is simply not presented by individuals who have not yet completed a substantive RICO violation or a RICO conspiracy violation.

As we argued in our principal brief, the complex statutory provisions in RICO §§1961 and 1962 setting forth what constitute a substantive RICO violation and a RICO conspiracy can usefully be viewed as Congress' definitions of what it takes for a person to be part of organized crime and therefore subject to RICO's enhanced sanctions. Congress can be seen to have created in the RICO statute a definition of a RICO defendant comparable to the repeat offender status created by repeat offender statutes.

Sedima can be viewed as holding that RICO's enhanced penalties, both civil and criminal, are not available against defendants who have not yet achieved RICO defendant status by completing a RICO violation. It is obvious that the enhanced penalties of the criminal RICO statute are not available to prosecutors for use against

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(Continued)

similarity between the struggle of common law judges to articulate a precise definition of the concept of 'proximate cause,' and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages." (footnotes omitted)). *See also Blue Shield*, 457 U.S. at 478 ("In applying that elusive concept [proximate cause] to this [antitrust] action, we look . . . to the physical and economic nexus between the alleged violation and the harm to the plaintiff . . . "); and *Radiant Burners, Inc. v. Peoples Gas Co.*, 364 U.S. 656, 660 (1961) *(per curiam)* (To state a claim under §1 of the Sherman Act, "allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires".)

defendants who have not completed a RICO violation. This same rule ought to apply to plaintiffs prosecuting civil RICO claims. There is simply no basis in the legislative history of the RICO statute for allowing RICO civil remedies to be recovered from defendants who were not part of organized crime, as defined by RICO, as of the time they injured the plaintiff.

The purpose and legislative history of RICO and the "by reason of" language used in its civil remedies section all suggest that civil RICO remedies should be available only against defendants who have become part of organized crime by completing a substantive RICO violation or conspiring to do so. The practical consequences of such a rule may not be particularly significant; a plaintiff injured by the first in a series of predicate acts may still have a §1962(d) RICO conspiracy cause of action. As we point out at page 33 of our principal brief, most plaintiffs injured by a first predicate act, committed by a "group of individuals," 18 U.S.C. §1961(4), which is followed by a pattern of such acts will be able to prove that a RICO conspiracy existed as of the time plaintiff was injured. Certainly, this will be true if the predicate acts are committed by defendants within a short time-frame. Any plaintiff who could prove that subsequent predicate acts constituting a pattern occurred shortly after the predicate act that injured plaintiff, could persuasively argue that it was injured "by reason of" a RICO conspiracy.

II. A Civil Cause Of Action Accrues When A Plaintiff Knows Or Has Reason To Know Of Its Injury. A Civil Action Cannot Ripen Into A RICO Action Because Defendants Subsequently Commit A RICO Violation.

A civil cause of action accrues when plaintiff knows or has reason to know of its injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, *reh'g denied*, 401 U.S. 1015 (1971); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984); *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000, 1004 (7th Cir. 1984). A civil cause of action cannot ripen into a RICO cause of action because defendants later commit a RICO violation.

The consequences of allowing a plaintiff to recover under RICO for an injury which is not causally traceable to a completed RICO violation are astonishing.

The most significant consequence is the virtual elimination of the effect of any civil statute of limitations.

A ruling which would allow a plaintiff to allege events occurring after its injury in order to achieve standing to make out a RICO cause of action would not only write the "by reason of" language out of §1964(c), it would also render meaningless any civil statute of limitations which the courts might adopt for RICO. This is so because such a ruling would necessarily render useless the usual civil accrual rule that a cause of action accrues when plaintiff knows or has reason to know of its injury.

Malley-Duff in fact argues, as it must, for the complete abandonment of this rule in civil RICO cases and for the adoption of one of two alternatives. Both alternatives contemplate the "ripening" of existing causes of action into RICO actions at some possibly distant point in the future

when defendants allegedly complete a pattern of racketeering activity.

Malley-Duff argues that this Court should adopt the criminal accrual rule for civil RICO cases and postpone accrual indefinitely by restarting the running of any civil limitations period adopted, each time an act allegedly takes place which is part of a RICO violation. The adoption of the criminal accrual rule in civil cases would extend indefinitely the running of any civil statute of limitations adopted and is inappropriate in civil cases which make injury the focus of the action. Its adoption would mean that a plaintiff could bring a civil RICO action regardless of when it was injured, as long as plaintiff alleged that defendants continued to engage in a pattern of racketeering activity whether directed at plaintiff or not.

The alternative accrual rule proposed by Malley-Duff would start the statute of limitations running when "plaintiff knows or has reason to know of both his injury and the existence of a pattern of racketeering activity."[6] This proposed rule is unworkable for a number of reasons. It would give a plaintiff the opportunity to indefinitely postpone the accrual of its cause of action by selecting the "pattern" evidence it offers against defendant. A plaintiff faced with statute of limitations problems, but in control of the evidence it offers at trial, could select to prove only certain of the predicate acts it suspected defendants had committed and thereby extend for many years the date on which a completed "pattern" is proved. This would put defendants in the strange, schizophrenic position of having to offer evidence to prove they completed a pattern of RICO predicate acts much sooner than plaintiff has proved, and that plaintiff knew or should have known it. This is in fact what

[6]Malley-Duff's Brief, pp. 33-34.

Malley-Duff is advocating in this case. Malley-Duff is arguing that material issues of fact exist concerning when it "knew or should have known about defendants' pattern of racketeering activity."[7] To rebut this, for summary judgment purposes, defendants would have to present evidence to show that: 1) they engaged in a pattern of racketeering activity; 2) that Malley-Duff knew or should have known about it before March 20, 1979 (two years before the action was filed); and 3) that there is no genuine issue of material fact about these issues. In other words, defendants would have to prove beyond a genuine issue of material fact that they were substantively liable to Malley-Duff in order to prevail on the procedural statute of limitations issue.

This proof role-reversal does not occur when the usual civil accrual rule is applied. A defendant can attempt to prove plaintiff was not injured or, if it was, that plaintiff should have known of its injury by some early date, without ever being forced to prove that defendant engaged in wrongful conduct.

Courts cannot realistically expect defendants to respond to a plaintiff's selective "pattern" proofs by proving that they (defendants) were engaged in many more predicate acts and therefore had completed a pattern of predicate acts much earlier than alleged by plaintiff.

This is the fundamental problem with the approach taken by cases like *Bankers Trust v. Feldesman*, 648 F. Supp. 17 (S.D.N.Y. 1986), relied on by plaintiff. *Bankers Trust*, citing a criminal RICO case for support, 648 F. Supp. at 490, would begin the running of the statute of limitations from the date of the last predicate act "on which plaintiff relies." *Id.* at 36. Because the boundaries of

[7] Malley-Duff's Brief, p. 35.

RICO's "pattern" definition are two predicate acts committed within ten years (or more if a defendant is incarcerated), the *Bankers Trust* approach potentially adds ten years (or more) to whatever statute of limitations the courts borrow for civil RICO.

The *Bankers Trust* approach makes the running of whatever statute of limitations is adopted depend on what constitutes a pattern of racketeering activity in a given case, *and* on what "pattern" evidence plaintiff presents. Both will always be to some degree uncertain (Was a pattern established after the second, third, fourth, . . . tenth predicate offense in a given case, and which predicate offenses has plaintiff decided to prove?) and will create uncertainty in the application of any statute of limitations adopted.

Certainty about when the statute of limitations begins to run for civil RICO can only be achieved if evidence not subject to uncertain "pattern" determinations and not readily subject to manipulation by plaintiffs triggers the running of the statute. A plaintiff's injury is just such an event certain.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the judgment of the United States Court of Appeals for the Third Circuit be reversed with instructions that Petitioners' Motion for Summary Judgment on Respondent's RICO claims for termination injuries be granted.

Respectfully submitted,

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Nos. 86-497 and 86-531

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

AGENCY HOLDING CORPORATION, et al.,
Petitioners,
v.
MALLEY - DUFF & ASSOCIATES, INC.,
Respondent.

CROWN LIFE INSURANCE COMPANY,
et al.,
Petitioners,
v.
MALLEY - DUFF & ASSOCIATES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

HMK Corporation, (hereinafter referred to as "the applicant"), by counsel, respectfully moves this Court for leave to file the following Brief of Amicus Curiae in Nos. 86-497 and 86-531. The questions of law which the applicant believes have not been presented and addressed by the parties in Nos. 86-497 and 86-531, and their relevancy to the disposition of these cases is set forth herein.

MOTION TO FILE BEYOND TIME LIMIT

The applicant moves this Court for leave to file its Brief of Amicus Curiae beyond the time limit. Counsel inadvertently failed to use Saturday, February 14, 1987 as a business day for the Court and filed instead on the next business day, Tuesday, February 17, 1987.

INTEREST OF AMICUS CURIAE

The applicant is the plaintiff/appellant in a civil action now pending before the United States Court of Appeals for the Fourth Circuit, styled HMK Corporation v. John C. Walsey, et al. (No. 86-3582). Among the issues involved in this controversy is the appropriate selection of a limitations period for civil RICO. The United States District Court for the Eastern District of Virginia, Richmond Division ruled that the one-year limitation available under Va. Code Ann. §8.01-248 (Repl. Vol. 1984) was to be applied to all civil RICO actions arising within the Commonwealth of Virginia. The argument advanced by the applicant that federal law should be utilized as the source of the limitations period was rejected by the district court. See HMK Corp. v. Walsey, 637 F.Supp. 710 (E.D. Va. 1986). The questions of law addressed in the following Brief of Amicus Curiae were raised by the applicant before both the district court and the United States Court of Appeals for the Fourth Circuit.

The applicant desires to bring to this Court's attention the arguments which support a selection of a limitations period for civil RICO by reference to federal

law consistent with the reasoning adopted by this Court in Del-Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 158-63 (1983). These arguments have not been addressed in the briefs filed herein by either petitioner.[1] These argument have been previously considered herein, however, and were addressed by Judge Sloviter in his concurring opinion in the court below. See 792 F.2d at 356.

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[1]. The applicant obtained the consent of the respondent to file it Brief of Amicus Curiae. Due to time limitations, the consent of the petitioners was not obtained.

SUMMARY OF ARGUMENT

Congress has not always provided the limitations period to be applied to the substantive rights that it has created. For over 150 years, federal courts have struggled with the question of how long a litigant's claim remains viable when the underlying federal statute prescribes no limitations period. In such instances, the federal courts do not assume that Congress intended that there be no limitations period applicable to the claim, but rather that the most suitable limitation be "borrowed" from another source.

In determining the source and specific limitations period to be used for "borrowing", the policies and purposes which limitations periods are designed to serve and effectuate must be reviewed and then applied to the particular federal claim before the court. From this analysis, the court can determine whether reference to state law or federal law for an appropriate limitations period best serves the ends which the federal substantive law was designed to achieve. In some instances, reference to state law as a source for a limitations period provides an unsatisfactory

method for enforcement of the federal substantive right. In such cases, this Court has approved reference to federal law to select an appropriate limitations period. See, e.g., DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). Once the appropriate source for a limitations period is deter-mined, the federal substantive claim can then be analyzed and characterized so that the most analogous limitations period from within that source can be determined and applied.

When such an analysis is undertaken with regard to a civil claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1982), the results favor reference to federal, rather than state law as the appropriate source for a limitations period.

Because of the unique multi-transactional, and oftentimes multi-jurisdictional, nature of civil RICO, it is impossible to obtain uniform or predictable results when reference is made to state law. The remedial goals of civil RICO are not served but are thwarted when state law is used as a source for the limitations period. When civil RICO is analyzed, it is the treble damage provision that stands out as its

most significant aspect. Accordingly, federal treble damage statutes, which uniformly provide for a four year limitation period, serve as the most appropriate limitations period to be applied and should be applied by this Court.

ARGUMENT

The Policy Considerations Which Limitations Periods Are Designed To Effectuate And Serve Dictate That Clarity To The Litigants Is the Most Important Aspect To Be Preserved.

Limitations periods are designed to effectuate and serve several broad, overlapping goals. The practical effect of a limitations period is to deny relief to the plaintiff if sufficient time has elapsed between the accrual of his cause of action and the commencement of his suit. This result occasionally offends notions of fairness and justice by allowing the wrongdoer to escape liability and leaving the injured party without remedy or relief. To justify this occasionally offensive result, various justifications have been articulated and various interests of the plaintiff, the defendant, the judicial system and society as a whole have been identified as being served by the imposition of limitations periods.

First, the limitations period serves to protect the reasonable expectations of the litigants. The plaintiff is informed of the period of time that he has to prepare and bring his suit. The

defendant is informed of the duration of his exposure to liability. At the conclusion of the limitation period, there comes a time when either party can be secure in his expectation that "the slate has been wiped clean." In a society based upon thousands of interpersonal transactions each day, it is desirable for all parties to a transaction or claim to terminate contingent liabilities at a specific, clearly defined point in time.

Limitations periods also serve the judicial system as matters of convenience and credibility. With increases in the caseload facing the judiciary, limitations periods reduce the number of potential claims awaiting resolution. Those claims in which it is more likely that memories have faded or documents and witnesses have been lost are barred from further litigation. Such a result diminishes the risk of perjury or fraud and allows judicial decision-making to be based upon a full and fair presentation of the facts.

It can never be forgotten, however, that the selection and application of a limitations period involves matters and questions of procedure, not substance. It is important, therefore, that

questions involving the selection and application of a limitations period involve as little uncertainty as possible and that courts, when faced with these questions, follow principles of law designed to bring clarity to the questions before them. When there is uncertainty regarding any matter of law, further litigation, with its attendant expense and delay, is encouraged. When there is uncertainty as to the outcome of a dispute, the parties are less likely to resolve the matter between them. Rather than protecting substantive rights, uncertainty in the law results in needless expense and delay. Such uncertainty puts a premium on creative lawyers and unlimited financial resources and suddenly, the law favors litigants who can afford long and expensive litigation to the disadvantage of the litigants whose substantive rights were in need of statutory protection.

Using clarity and the removal of uncertainty as the most important policy consideration of a limitations period, all of the various interests identified in judicial decisions are served. Courts are able to clearly signal to potential plaintiffs the amount of time that they have in which to prepare and bring their claim.

Defendants are clearly on notice as to the time period for which they are exposed to liability. All parties to the claim or transaction know the specific date when contingent liabilities are removed. When the selection and application of the limitations period is clear and not subject to uncertainty and continuing dispute, the judicial system is able to devote its resources to the substantive merits of the dispute rather than permitting justice to be delayed, or even forestalled by litigation of procedural matters.

The Civil RICO Cause of Action Is Unique and Unlike Any Pre-existing Statutory or Common Law Action

Contrary to the statement of the United States Court of Appeals for the Sixth Circuit in Silverberg v. Thompson McKinnon Securities, Inc., 787 F.2d 1079 (6th Cir. 1986), civil RICO is a unique statute unlike causes of action previously created by statute or known at common law. Unlike any single existing cause of action, civil RICO has application to a wide variety of predicate acts. Reference to §1961(1) reveals the breadth of

its scope.[2] Civil RICO has application to widely varying commercial transactions. These include the acquisition or establishment of an enterprise as well as its conduct and operation. While some nexus to interstate or foreign commerce is required, no other condition is provided that would limit the application of civil RICO to one sector of the economy or protect another sector of the economy from its reach. Under civil RICO, conduct that can only be punished as criminal upon proof beyond a reasonable doubt will nevertheless support civil sanctions under a lesser standard of proof. The remedy of treble damages provided to the successful plaintiff under §1964(c) further illustrates the uniqueness of the civil RICO claim. See generally, Note, Treble Damages Under RICO: Characterization and Computation,

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2. 18 U.S.C. §1861(1) defines "racketeering activity" to include nine state law felonies and violations of over 25 federal statutes, including those prohibiting bribery, counterfeiting, embezzlement of pension funds, gambling offenses, obstruction of justice, interstate transportation of stolen property and labor crimes.

61 Notre Dame L Rev. 526 (1986). Finally, the legislative history of RICO also illustrates the unique nature and character of civil RICO. Congress intended RICO to provide "new weapons of unprecedented scope." Russello v. United States, 464 U.S. 16, 26 (1983). In fact, it was the failure of existing law that led to the consideration and enactment of RICO, as existing laws were deemed to be inadequate.

The Interests To Be Protected by Civil RICO Are Best Served By A Uniform Limitations Period.

Once the policy considerations and principles which limitations periods are designed to serve are reviewed and the unique character and nature of civil RICO is recognized, the next step in the selection process for the appropriate limitations period is to determine whether the interests and goals of civil RICO are best served by characterizing a claim under civil RICO with reference to the underlying facts in each case or whether the interests to be protected by RICO are best served by a uniform characterization. The United States Court of Appeals for the Third Circuit in Malley-Duff & Associates, Inc. v. Crown Life Insurance Co., 792 F.2d 341 (3rd Cir.), cert. granted (Dec. 1,

1986), recognized the need for uniformity in determining the limitations period to be applied to civil RICO. Relying heavily upon this Court's decision in Wilson v. Garcia, 471 U.S. 261 (1985), the Third Circuit reasoned that a uniform characterization of civil RICO best fit and promoted the remedial purposes of the statute. When a particularized approach was taken, i.e., an approach which selected a limitations period based upon the particular facts of each case, consistent, reliable results were impossible to obtain as usually two or more limitations periods would apply. Reciting the experience found by federal courts in the handling of claims under 42 U.S.C. §1983 prior to Wilson v. Garcia, the Third Circuit noted that selection of the limitations period based upon "an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of §1983." 792 F.2d at 347, quoting Wilson v. Garcia, supra, 471 U.S. at 272.

Applying this reasoning to civil RICO, the Third Circuit easily concluded that the interests to be protected by civil RICO were best served by a uniform

characterization and the application of a single limitations period to all civil RICO claims without regard to the underlying predicate acts relied upon or the underlying factual transaction from which the claim arose. Concepts required to state a claim under civil RICO, such as "pattern of racketeering activity", were unknown in the statutory and common law which predate RICO's enactment. Consequently, factual analogies to existing statutory or common law claims were unlikely to produce consistent or reliable results. Specific factual claims could easily be distorted by litigants and their counsel to avoid the application of one limitations period and attempt to qualify for another. Because civil RICO requires the commission of at least two predicate acts, a selection process which focuses on the specific factual basis of a civil RICO claim was likely to produce at least two or more limitations periods which could be applicable to the facts at hand. The result of such a selection process would be "complex and expensive litigation over what should be a straight forward matter." A.B.A. Section of Corporation, Banking and Business Law, Report of the Ad Hoc Civil RICO Task Force 391-92 (1985).

The Third Circuit recognized in Malley -Duff just as this Court did in Wilson v. Garcia, that "the legislative purpose to create an effective remedy for an enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." 792 F.2d at 349, quoting with approval Wilson v. Garcia, supra, 471 U.S. at 275. The Third Circuit concluded that civil RICO, like claims under §1983, "was intended to be a useful remedial device and a supplement to criminal law enforcement in an area peculiarly in need of federal intervention." Id. As such, uniformity and the selection of a uniform statute of limitations best served to protect its effectiveness.

Nationwide Uniformity Best Serves To Protect the Effectiveness of Civil RICO.

The United States Court of Appeals for the Third Circuit chose not to analyze in any depth or detail whether state law or federal law should serve as the source for a limitations period applicable to civil RICO. Having set forth compelling arguments that any selection process that permitted uncertainty would

encourage litigation and thwart the remedial purposes of civil RICO and that the interest of civil RICO were best served by uniformity, the Third Circuit was satisfied to conclude that a single uniform limitations period within the boundaries of a state was sufficient. The same reasoning that compels selection of a single limitations period for a particular state further compels the conclusion that the best choice is a single limitations period applicable to all civil RICO claims nationwide.

While resort to state law to borrow a limitations period is favored and has been traditionally followed by federal courts, it does not represent the only option available. This Court recognized in DelCostello v. International Brotherhood of Teamsters, 462 U. S. 151 (1983) that "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law." 462 U.S. at 172. In analyzing civil RICO, there are several reasons to find that federal law is "a

significantly more appropriate vehicle" as well as several reasons to find that the application of state law is inconsistent with the underlying policies of the federal statute.

First, civil RICO by definition is multi-transactional; it requires the commission of two or more predicate acts without regard to the location of their commission. In order to satisfy the various definitions of "pattern" that have been developed since this Court's ruling in Sedima, S.P.R.L. v. Imrex Co., - U.S. -, 105 S.Ct. 3275 (1985), some separateness in time and place between the two or more predicate acts is required. Second, some nexus to interstate or foreign commerce is required as a jurisdictional element of a civil RICO claim. Therefore, in most claims under civil RICO the conduct complained of will cross state boundaries and the pattern of racketeering activity will be subject to multiple limitations periods. A litigant will have a choice of forums in which to bring

his claim and based upon the manner in which the claim is drafted, the litigant can influence which limitations period to which his claim is to be held.[3] Just as uncertainty as to the limitations period to be applied within a state was seen as thwarting the remedial purposes of civil RICO, so will the uncertainty of which limitations period is to be applied in a multi-jurisdictional claim. Just as litigants are encouraged to distort their claims to take advantage of one of several limitations periods within a state, likewise, they would be encouraged to distort their claims to take advantage of a forum that presents a more favorable limitations period. This process focuses attention on matters of procedure rather than the protection of substantive rights and favors litigants who can afford long and expensive litigation to the disadvantage of the poor and moderate litigants. Likewise, uniformity which ends at the state

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[3]. As an example, the Third Circuit noted in Malley - Duff supra, 792 F.2d at 353, n.20 that the allegations of Malley - Duff involved conduct in Cleveland, Ohio, Chicago, Illinois and other cities.

boundary encourages forum-shopping which is also to the disadvantage of the poor. Anytime that there is uncertainty, whether within a state or within a multi-state transaction, the remedial purposes which civil RICO was enacted to serve are not advanced but are thwarted.

This Court's Decision in Wilson v. Garcia Does Not Compel the Conclusion that Reference to State Law is Required.

As discussed by Judge Sloviter in his concurring opinion in Malley - Duff, there are reasons, consistent with this Court's analysis in Wilson v. Garcia, which favor the federal law result adopted in DelCostello rather than the state law approach taken in Wilson v. Garcia. Wilson v. Garcia involved the selection process for the limitations period to be applied to claims under 42 U.S.C. §1983. A comparison of §1983 claims with elements of a claim under civil RICO reveal that the policy considerations which made reference to state law appropriate in Wilson v. Garcia do not apply and are not present in civil RICO. Claims under §1983 usually involve a single act or transaction. Civil RICO by definition requires two or more acts which are separated in time and

place. In claims under §1983, the injury likely occurs at a single time and single place. Such a single-event injury under civil RICO is insufficient to establish a pattern. By definition, a claim under §1983 requires the presence of state action and for that reason is usually limited to a single state or governmental locality. A claim under §1983 does not require a nexus to or an affect upon interstate commerce. Of course, under civil RICO, the requirement of an effect upon interstate commerce is present while a requirement for state action is not. Because of the distinct differences between the cause of action under §1983 and civil RICO, it is clear that the result in Wilson v. Garcia is not applicable here.

Unlike §1983 which could be universally analyzed to a tort action for recovery of damages for personal injuries, civil RICO presents no such universally available or readily apparent state law analogy. As was evident by the opinion of the majority in Malley - Duff, there is usually no closely analogous state claim or state limitations period that could be readily agreed upon. A review of the prolific litigation in federal courts regarding the selection of a limitations period

further illustrates that no clearly recognized choice has emerged.

To the extent any specific analogy has been accepted more often than others, it is the "catch - all" limitations period utilized by the majority in Malley - Duff. There are several reasons, however, for rejecting this approach. First, this Court in Wilson v. Garcia rejected the use of a "catch - all" statute for application to claims under §1983. Second, the absence of a "catch-all" limitations period in some states distinguishes it from the personal injury characterization used in Wilson v. Garcia. Finally, several states have short periods assigned to their "catch-all" statute which would be inconsistent with the federal intention and policy to utilize civil RICO as an additional enforcement tool.[5]

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[5]. Judge Sloviter in his concurring opinion in A. J. Cunningham Packing Corp. v. Congress Financial Corp., 792 F.2d 330, 340 (3rd Cir. 1986), which was filed on the same date as Malley - Duff, noted: "Although Pennsylvania's catch-all of six other states might have a short catch-all which would be

Consequently, there is nothing in the language or the reasoning in Wilson v. Garcia that would limit the selection of a limitations period for civil RICO to those available under state law. To the contrary, there are strong policy considerations which favor a uniform limitations period which is applicable to civil RICO claims nationwide and which is applied uniformly without regard to the state in which the underlying transaction occurred.

The Legislative History of Civil RICO Does Not Reveal a Congressional Intent Against Nationwide Uniformity.

The United States Court of Appeals for the Sixth Circuit in Silverberg v. Thompson McKinnon Securities, Inc., supra, 787 F.2d at 1083, places great weight on its view of civil RICO's legislative history that "Congress specifically considered and rejected the enactment of a

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inconsistent with federal policy ...." See also Tellis v. United States Fidelity & Guaranty Co., 805 F.2d 741, 749 (7th Cir. 1986) (Ripple, J., Dissenting). Some "catch-all" statutes expire in as short a period as one year such as the limitation applied in HMK Corp. v. Walsey, 637 F.Supp. 710 (E.D. Va. 1986).

limitations period for civil RICO actions, thus declining to adopt a uniform limitations period for all RICO claims." Such is not the case.

It is incorrect to suggest, as the Second Circuit did in Sedima, that while RICO "for the most part originated in the Senate", the civil provisions permitting suit by private persons "originated in the House." Sedima, S.P.R.L. v. Imrex, Co. 741 F.2d 482, 488, rev'd, - U. S. -, 105 S.Ct. 3275 (1985). A review of the legislative history of the 1970 Act demonstrates the misconceived character of this view. First, Congress acted deliberately in its enactment of the Organized Crime Control Act. Congressional investigations, presidential commissions, and bar associations played major roles. The process originated in the hearings and reports of the Kefauver Committee. The American Bar Association formed its Organized Crime Commission and participated actively in the process, recommending model legislation.[6] In

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[6]. See, e.g., 2 Organized Crime and Law Enforcement (1953) (Final Report By and Model Acts Prepared for The ABA Commission on Organized Crime); Organized Crime

1967, the President's Commission on Law Enforcement and Administration of Justice made the key recommendation that led to RICO when it urged that Congress adopt antitrust type remedies to control underworld activities, particularly in legitimate business.[7] In response, Senator Hruska and Congressman (now Virginia Supreme Court Justice) Poff introduced companion legislation that included criminal and civil sanctions and public and private enforcement mechanisms in both Houses of the Congress. See e.g., S. 2048, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 17,999 (1967). The ABA carefully studied the bills and endorsed their private relief concepts, but recommended that the Congress draft RICO outside of the antitrust statutes to give its

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Control: Hearings Before Subcomm. No. 5, House Comm. on Judiciary, 91st Cong., 2d Sess. 579-85 (1970) (hereinafter House Hearings.).

7. The Challenge of Crime in a Free Society: Final Report of the President's Commission on Law Enforcement and Administration of Justice 208 (1967) ("techniques ... especially valuable because they require a less rigid standard of proof").

remedies and provisions a broader impact then that which would be appropriate in the regulation of the market under antitrust concepts. The ABA presented these recommendations to the House and the Senate in 1969.[8] Additionally, the National Commission on Reform of the Federal Criminal Law undertook similar studies. The Commission included Congressman Poff as its vice-chairman, and Senators McClellan and Hruska, as well as Congressman (now Judge) Mikva. Subsequently, Senator Hruska and Congressman Poff drafted new legislation that took the ABA at its word. They introduced this legislation in both Houses.[9] The Senate held hearings at which the ABA orally presented its favorable views. The President also endorsed the legislation while it was being processed in The Senate

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8. Measures Relating to Organized Crime: Hearings Before the Subcomm. on Crim. Laws and Procedures, Senate Comm. on Judiciary, 91st Cong., 1st Sess. 259 (statement), 556 (report) (1969); House Hearings at 537 (statement), 147 (report).

9. See, e.g., S. 1623, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 6,995-96 (1969).

and specifically called for antitrust-type remedies in his "Message on Organized Crime."

As a result of the hearings, Senators McClellan and Hruska, after consultation with Congressman Poff, introduced S. 1861. 115 Cong. Rec. 9,566-68 (1969). While S. 1861 did not include an express private claim for relief, it is erroneous to conclude that S. 1861 did not give rise to an implied claim for relief, or to argue that the sponsors of the legislation had rejected the concept of the private attorney general. Not one word in the remarks introducing the legislation supports this proposition.[10] The bill itself said in its Statement of Findings and Policy that it included "other relief." 115 Cong. Rec. 9,568 (1969). The legislation was termed "remedial" and its "liberal

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10. When Senator McClellan introduced S. 1861, for example, he said he did not want to see the "great complexity of antitrust law enforcement" introduced into the construction of RICO. 115 Cong. Rec. 9,567 (1969). That "complexity" is, of course, the jurisprudence on standing, which is applicable to private, not public enforcement.

construction" was mandated. Id. at 9,571. Accordingly, it should be concluded that the Organized Crime Control Act, as amended in Title IX to include the text of S. 1861, and as passed by the Senate, gave rise to an implied private claim for relief.[11] Not one word of legislative history can be cited to establish that Senators McClellan or Hruska - or any other senators - spoke against such a private claim for relief. The Organized Crime Control Act then passed the Senate by a vote of 73 to 1. 116 Cong. Rec. 972 (1970).

While the legislation was pending in the House, the President asked the ABA to study it. The ABA's views were presented to the House Committee in oral testimony by its president-elect, Edward L. Wright. He called for the House to restore to the bill the treble damage provision that had appeared in S.1623. House Hearings, at 543-44. The Committee was well aware

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11. See generally, Johnson, Predator Rights: Multiple Remedies for Wall Street Sharks Under the Securities Laws and RICO 10 J. of Corp. Law 3 (1984), Note, Availability of Equitable Relief in Cause of Action Under RICO 59 Notre Dame L. Rev. 945 (1981).

of the scope of the bill as passed by the Senate, since the Association of the Bar of the City of New York had objected in testimony before the House Judiciary Committee to its reach beyond "organized crime," including its application to "any securities fraud case." House Hearings, at 294. Moreover, Senator McClellan took the floor and called to the Senate's attention the ABA's recommendations; he explicitly characterized its recommendation for the restoration of the treble damage provision as a "constructive contribution." 116 Cong. Rec. 25,190 (1970).

The House Committee reported the Organized Crime Control Act in the enacted language. H. R. Rep. No. 1549, 91st Cong., 2d Sess. 56-58 (1970). Dissenting committee members, including Congressman Mikva, specifically objected to the private civil provisions' breadth, because the provisions were not limited to "organized crime." The dissenting members noted that the provisions were "a tool to be employed for all." Id. at 187. They also stressed the burden that this breadth might place on the courts. Id.

During the vigorous House debate, Congressman Steiger of-

fered a comprehensive amendment that included seven different provisions, not a single subject matter amendment relating only to statute of limitations as Silverberg implies. 787 F.2d at 1083).[12] Congressman Poff suggested that Steiger withdraw his amendment and Congressman Steiger quickly agreed. 116 Cong. Rec. at 35,346-47 (1970). The amendment was not "rejected" as Silverberg noted. As such, little can be inferred from the failure to adopt the Steiger amendment. Certainly, no Congressional intent against nationwide uniformity can be ascertained from Congressional in action.

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12. The Steiger amendment contained provisions that would have provided that no amount in controversy was required, clarified the availability of equity relief, included a claim for relief for damages for the government, repeated the private claim for treble damage relief, authorized the attorney general to intervene in private litigation, provided for non-mutual estoppel between government criminal and private civil cases, and imposed a uniform federal statute of limitations on RICO suits. 116 Cong. Rec. 35,346 (1970).

The Most Significant Aspect To Be Used To Characterize Civil RICO Is Its Provision for Treble Damages.

The treble damage provision under civil RICO, 18 U.S.C. §1964(c), has been recognized as its most significant aspect. See, e.g. Tellis v. United States Fidelity & Guaranty Co., 805 F.2d 741, 745 (7th Cir. 1986). It is the treble damage provision that draws most RICO plaintiffs to rely upon the RICO civil action.[13] It

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[13] Traditionally, damages have been classified into one of two catagories: compensatory or punitive. Treble damages under civil RICO, however, do not fit within either category. Like compensatory damages, treble damages under civil RICO are mandatory once the plaintiff establishes the right to recovery and the extent of injury. While the intent of treble damages is to compensate the plaintiff, they go beyond traditional compensatory damages and make the plaintiff whole for any accumulative harm, i.e., harm falling outside the range of legal damages as being too speculative or indeterminate for traditional damage principles. Unlike punitive damages, treble damages under civil RICO are not discretionary in amount or award.

is the treble damage provision that was intended to provide an incentive to private citizens to help law enforcement authorities police racketeering activity. The significance of the treble damage provision as the core of civil RICO was recognized by this Court in Sedima, supra, 105 S. Ct. at 3280-81.

Congress modeled civil RICO's treble damage provision after the anti-trust treble damage provision, §4 of the Clayton Act, 15 U.S. C. §15 (1982). This reflected a need to adopt a remedial scheme that would curtail and eventually eradicate the expansion of crime into the country's economy. In order to avoid restrictive principles in the anti-trust laws, however, Congress enacted civil RICO separate from the Clayton Act. The legislative history of §1964 (c) reveals that the foremost intent of Congress in enacting this provision was remedial, not penal. It was the congressional intent to compensate the victims of racketeering activity. The statute itself contains the

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They are not based upon an amount necessary to punish the wrongdoer and are not dependent upon willful or wanton conduct.

directive that its provisions "shall be liberally construed to effectuate its remedial purposes." The modern interpretation of the treble damage provisions contained both in civil RICO, and its model found in the Clayton Act, therefore, is that they are remedial in nature. Accordingly, when looking for a federal limitations period to apply to civil RICO reference to penal statutes and the limitations periods applicable thereto are not consistent with the remedial purposes of civil RICO and should not be utilized. Rather, statutes which contain analogous treble damage provisions better serve as reference points.

Reference to Federal Treble Damage Statutes Illustrates that the Limitation Period Under the Clayton Act Is The Most Analogous Period and Should Be Applied to Civil RICO

Once the analysis concludes that national uniformity is the best choice and that the most significant aspect of civil RICO is its treble damage remedy, reference to other federal treble damage claims provides the various

choices available.[14] The clearest analogy to RICO is the federal antitrust statutes. Civil RICO is a remedy provided by Congress to discourage repeated criminal behavior that results in economic injury and to fully compensate the victims of that injury for all accumulated harm. The civil remedy under §4 of the Clayton Act serves the same purpose. Both civil RICO and §4 of the Clayton Act seek to provide private civil actions for persons "injured in their business or property." Both utilize the same statutory language. The same goals, to remedy competitive injuries to business and to compensate victims for accumulative harm, underlie both statutes. Most importantly, Congress uses §4 of the Clayton Act as the model for the civil provisions of RICO as recognized by this Court in Sedima, S.P.R.L. V. Imrex, supra, 105 S. Ct. at 3280-81, 3282 n.8. Consequently, the limitations period found at 15 U.S.C. §15b should be uniformly

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14. Of those federal treble damage statutes which contain a limitations period, the period selected uniformly is four years. See 12 U.S.C. §1464(9)(3) (Home Owners' Loan Act); 12 U.S.C. §1977 (Bank Holding Company Act); 15 U.S.C. §15b (Clayton Act).

applied to all civil RICO actions.[15]

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15. See generally Note, A uniform Limitations Period for Civil RICO, 61 Notre Dame L. Rev. 495 (1986).

CONCLUSION

For the foregoing reasons, the applicant respectfully requests that this Court determine that the interests of RICO are best served by a uniform limitations period applicable to all civil RICO actions nationwide and that the four-year limitation contained in 15 U. S. C. §15b be selected and uniformily applied.

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Nos. 86-497 and 86-531

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

AGENCY HOLDING CORP., et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

On Writs of Certiorari to the Court of Appeals for the Third Circuit

BRIEF AMICI CURIAE FOR A.J. CUNNINGHAM PACKING CORP., CHICAGO DRESSED BEEF CO. INC. CONTINENTAL FOOD PRODUCTS, INC., FLORENCE BEEF COMPANY, AND PIERCE TRADING COMPANY IN SUPPORT OF RESPONDENT

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I. THE INTEREST OF THE AMICI

Amici Curiae, A.J. Cunningham Packing Corp., Chicago Dressed Beef Co., Inc., Continental Food Products, Inc., Florence Beef Company and Pierce Trading Company, are

plaintiffs in litigation pending against amici curiae, Congress Financial Corporation ("Congress") and Philadelphia National Bank ("PNB"). The Complaint in that litigation sets forth claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961 *et seq*. (1982). An appeal by amici in that litigation presented some of the same statute of limitations issues as those presented for review by the instant writs of certiorari and was argued and decided in the United States Court of Appeals for the Third Circuit concurrently with the decision here for review, *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co.*, 792 F.2d 341 (3d Cir. 1986). *See A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330 (3d Cir. 1986). Amici's RICO action is still pending in the district court and will necessarily be affected by any decision by the Supreme Court concerning the appropriate selection of a limitations period for RICO claims.[1]

II. SUMMARY OF ARGUMENT

In *Wilson v. Garcia*, 105 S.Ct. 1938 (1985), this Court required uniform characterization of federal civil rights damage claims for purposes of "borrowing" the most appropriate state period of limitation. This requirement was based on: (1) the fact that the values at stake were uniquely and overwhelmingly federal in nature; (2) the fact that Congress was unlikely to have contemplated the wide diversity of claims which ultimately came to be embraced by civil rights actions; and (3) the considerations of practicality and predictability inherent in eliminating litigation on a case-by-case basis as to how to characterize the numerous and diverse types of civil rights claims for limitations purposes.

The RICO statute does not implicate the kind of uniquely federal values which are at stake in civil rights cases. Moreover, in view of the statutory definition of a RICO violation Congress clearly did contemplate that the RICO damage remedy would encompass numerous and diverse kinds of conduct. Finally, a case-by-case approach to borrowing limitations periods from

1. A written consent by all parties to the filing of the instant brief amici curiae has been separately filed with the Court.

state law for purposes of RICO does not, from a practical standpoint, represent the same kind of confusing and time-consumming process as it did in the area of civil rights. Given the reality acknowledged in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275 (1985), that in excess of 80 percent of RICO litigation involves fraudulent conduct, most limitations questions under RICO are simply resolved by borrowing the fraud limitations provisions provided by state law.

However, if considerations of convenience, predictability, and practicality warrant uniformity of resolution for all RICO limitations questions, this Court should apply the four year limitations period given by Section 4 of the Clayton Act, 15 U.S.C. §15, under the rule recently set down by the Court in *DelCostello v. Teamsters*, 462 U.S. 151 (1983) because the treble damage remedy given by the Clayton Act forms a closer analogy to the treble damage remedy given by RICO than any available state statutes.

If uniformity is desirable and if the Clayton Act's four year limitations period is not one which may appropriately be borrowed, this Court should characterize RICO claims as actions for fraud or, alternatively, as actions for violation of a statute. Such a characterization would best reflect the legislative contemplation that RICO's private damage remedy would be used primarily as redress for fraudulent behavior or Congress' expressed intent that the remedy apply only where there was proof of violations of enumerated state and federal statutes.

Characterizing RICO claims as actions for injury to "tangible and intangible property" would not accomplish *Wilson's* goal to eliminate time-consuming and expensive litigation over limitations questions but would, in fact, exacerbate that problem. This is because the limitations schemes of the states specify different periods of limitation depending on the type of intangible interest damaged and the manner of the infringement. Characterizing the RICO action as a claim for penalty or forfeiture would be inappropriate because many states, including Pennsylvania, define limitations periods for penalty and forfeiture actions to exclude damage claims such as those arising under RICO.

III. ARGUMENT

A. An Introduction: The *Wilson v. Garcia* methodology

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq.* (hereinafter "RICO") does not set forth a specified period of limitations which applies to claims for damages arising under the Act. Since that is the case, the federal period of limitations should generally be the period of limitation which applies to the most analogous state cause of action, so long as it is appropriate to effectuate the remedial purposes of the federal enactment. *See e.g., Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975). *But see, pp.* 8-10, *infra*. Prior to this Court's decision in *Wilson v. Garcia*, 105 S.Ct. 1938 (1985) (hereinafter "*Wilson*"), this had required a particularized analysis of the facts and circumstances involved in each federal claim on a case-by-case basis in order to identify the state limitations period most precisely analogous to that claim. *Wilson* explicitly changed that for cases arising under the civil rights laws. The question presented by the Third Circuit's opinion here is whether *Wilson*, by analogy, also requires a departure from a facts and circumstances approach to limitations questions in cases arising under RICO.

Wilson involved a federal civil rights claim under 42 U.S.C. §1983 in which this Court undertook to decide what period of limitations to apply to the claim. The Court found that in its analysis of this issue, Section 1988 of the civil rights statute "directed" it to follow a three step process:

> "First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil rights] statute into effect.' If no suitable federal rule exists, courts undertake the second step by considering application of the state 'common law, as modified and changed by the Constitution and statutes' of the forum state. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States."

Wilson, 105 S.Ct. at 1942-43 (citations omitted.)

Finding that there was no federal rule on point, the *Wilson* decision observed that the case primarily involved the second step in the process — the selection of the most appropriate or analgous state statute of limitations to apply to the Section 1983 claim before it. *Id.* at 1943. This selection process was understood to be composed of two discrete inquiries: (1) whether all civil rights claims under Section 1983 should be characterized in the same way or differently depending on the varying factual circumstances and legal theories present in each individual case; and (2) if a uniform characterization was appropriate, what it should be.

Wilson concluded that all civil rights claims should be characterized in the same way for limitations purposes. There were two considerations which supported this conclusion. The first was one of policy and practicality. Here, Justice Stevens observed that the behavior potentially violative of the civil rights statute encompassed so many "numerous and diverse topics and sub-topics" that an individual "facts and circumstances" approach to the limitation question would inevitably breed uncertainty and time-consuming litigation that was foreign to the central purposes of Section 1983. *Id.* at 1945-46. The second consideration supporting a uniform characterization of Section 1983 claims for limitation purposes was one of statutory construction. It was highly unlikely, this Court reasoned, at the time Section 1983 was enacted "that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace." *Id.* at 1946. Thus, the decision concluded that it was likely that Congress expected uniformity and simplicity in the judicial treatment of such claims.

Having determined that all civil rights claims should be uniformly characterized for limitations purposes, the opinion concluded by holding that they should be characterized as claims for personal injuries rather than statutory torts subject to state "catchall" statutes of limitation. There were three distinct reasons supporting this conclusion. First, the legislative history underlying the civil rights statute revealed that the legislature was focusing on violations of civil rights involving personal injuries. *Id.* at 1947-48. Thus, the opinion reasoned, it was likely that

Congress viewed the remedy it was creating as one primarily for such personal wrongs. *Id*. Second, at the time Section 1983 was enacted there was a scarcity of statutory tort claims making it unlikely "that Congress would have intended to apply the catch-all periods of limitations for statutory claims that were later enacted by many states." *Id*. at 1948. Finally, because personal injury actions were so common in all states, it was unlikely that the limitations period applicable to them could be fixed in such a way as to discriminate against federal claims. *Id*. at 1949.

B. It is Dubious that *Wilson* Supports a Uniform Characterization of RICO Claims for Limitations Borrowing Purposes.

The applicability of the *Wilson v. Garcia* methodology to a determination of the appropriate period of limitations for civil RICO claims is doubtful. In the first place, the *Wilson* analysis was "directed" by a civil rights statute, 42 U.S.C. §1988, which has absolutely no application to non-civil rights claims such as those arising under RICO.

Secondly, even if the *Wilson* analysis is properly brought to bear by analogy, the critical factors relied upon by *Wilson* to require the uniform characterization of a federal civil rights claim for purposes of "borrowing" the analogus state period of limitations are attenuated in the RICO area. *Wilson* found that such uniformity in characterization was required because the values at stake in the litigation of a Section 1983 civil rights claim were constitutional in dimension, and uniquely and overwhelmingly federal in nature. However, the values protected by the RICO enforcement mechanism are neither consitutional in dimension nor wholly federal in nature.[2] Thus, the policy rational which called for uniformity in treatment of the uniquely federal civil rights action is not compelling in the field of RICO litigation.

2. The provisions of RICO [illegible] unlawful a pattern of predicate acts which are not only indictable under federal law but which are "chargeable under state law and punishable by imprisonment for more than one year." *See*: 18 U.S.C. §1961(1).

Moreover, the considerations of statutory construction relied upon by *Wilson* are absent here, even by analogy. A central consideration in the *Wilson* decision was the view that in enacting the civil rights laws Congress did not expect that Section 1983 would apply to "a wide diversity of claims." This supported the conclusion, as a matter of statutory intrepretation, that the legislature expected uniformity in the treatment of such claims. As this Court noted in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct.3275, 3286 (1985) and as demonstrated by Petitioners in their briefs here, the RICO statute makes unlawful a multiplicity of specific predicate acts provided they are sufficiently related to constitute a statutorily defined pattern. These involve such diverse behavior as murder, obstruction of justice, wire fraud, mail fraud, unlawful welfare fund payments, extortion, and more. See 18 U.S.C. §1961(1). Thus, unlike the civil rights statutes, it cannot even reasonably be argued that Congress did not expect the RICO remedy to apply to the "wide diversity of claims that the remedy would ultimately embrace." That diversity is clearly created by the statutory language itself. Thus, the principle of statutory construction which warranted uniform characterization of civil rights claims under *Wilson* is altogether lacking for RICO claims.

Whether this Court should require uniform characterization of RICO or any other federal claim based solely on the practical considerations referred to in *Wilson* is dubious. Moreover, these practical considerations are attenuated in the RICO area. It is true that RICO, like the civil rights statute, potentially encompasses "numerous and diverse topics" with analogies to different causes of action having different periods of limitation under state law. However, unlike the civil rights area, this potential diversity is largely theoretical and not experienced as part of the reality of RICO litigation. That reality, recognized by this Court's *Sedima* decision, is that most RICO actions are predicated on acts of common law or securities fraud for which analogies to state law are clear and direct. *See Sedima v. Imrex, supra*, 105 S.Ct. at 3287 n. 16. Accordingly, even under the case-by-case approach most limitations questions arising in RICO cases can readily be resolved by looking to the limitations period afforded

by the states to claims for securities fraud and common law misrepresentation.

C. If Uniform Treatment of RICO Claims is Appropriate, the Court Should Apply the Period of Limitations Given by the More Nearly Analogous Provisions of the Clayton Act.

If a monolithic approach to the characterization of RICO claims is appropriate because of the practical considerations specifically identified in *Wilson* then, we submit, these practical considerations weigh in favor of focusing on the first rather than the second step of the three step process identified in *Wilson*. It will be recalled that *Wilson* held that the first step in the process of determining what limitation period to apply to a federal claim is to ascertain whether any federal principle should apply the appropriate rule of decision.

In *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977), this Court recognized that it "has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute." *Id.* at 367. It pointed out that "[s]tate legislatures do not devise their limitations period with national interests in mind," and reiterated that [a]lthough state law is our primary guide in this area, it is not, to be sure, our exclusive guide." *Id., quoting Johnson v. Railway Express Agency*, 421 U.S. 454, 465, (1975). And in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Court set forth the circumstances under which a limitations period given by an express federal provision should be borrowed in lieu of any state analogue:

> "[W]hen a rule from elsewhere in federal law provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making, we have not hesitated to turn away from state law."

Id. at 171-72. *See also, McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (federal limitations period applied to seaworthiness action under General Maritime Law rather than state statute governing personal injury); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977) (federal law applied to EEOC enforcement action).

The federal antitrust laws manifestly provide a closer analogy to the civil RICO claim than any of the myriad available state statutes. *See A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 338-341 (3d Cir. 1986) (concurring opinion of Judge Sloviter, incorporated by reference in the Third Circuit Malley-Duff opinion); *Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporate Banking and Business Law* at pp. 385-387 (March 28, 1985); *State Farm Fire & Casualty Co. v. Estate of Canton*, 540 F.Supp. 673 (N.D. Ind. 1982). Both the civil remedy given by Section 4 of the Clayton Act, 15 U.S.C. §15, and that given by the civil enforcement provisions of RICO, 18 U.S.C. §1964(c), provide for the same thing in the same language — the recovery of "three-fold damages and the costs of suit including a reasonable attorney's fee." These remedies, treble damages and the recovery of counsel fees, are foreign to the remedial tort schemes of most states. Moreover, the injury and causation required to invoke the damage remedy is described in both the Clayton Act and in RICO in the same language as injury to a person "in his business or property by reason of" a violation of the relevant law. *Compare:* 15 U.S.C. §15 with 18 U.S.C. §1964(c). Finally, the legislative history underlying the enactment of the civil RICO remedy reveals that Congress not only viewed RICO as analogous to the Clayton Act, but that the Clayton Act served as the model for the civil provisions of RICO. During hearings on S. 30 before the House Judiciary Committee, representative Steiger proposed the addition to RICO of a private treble damages action "similar to the private damage remedy found in the antitrust laws. . . ." "Hearings on S. 30 and the related proceedings before Subcommittee No. 5 of the House Committee on the Judiciary," 91 *Cong. 2d*

Sess. at 520 (1970). And the American Bar Association also proposed an amendment "based upon the concept of Section 4 of the Clayton Act." *Id.* at 543-544, 548, & 549. Summarizing this legislative history, this Court said in *Sedima:* "The clearest current in that history is the reliance on the Clayton Act model," a model significantly different than the tort schemes of the states. *See: Sedima, S.P.R.L. v. Imrex Co., Inc., supra,* 105 S.Ct. at 3282. Accordingly, the first aspect of *DelCostello* — the presence of a closer analogy in federal law than available state statutes — is present.

The second aspect of *DelCostello,* the requirement that the "the federal policies at stake and the practicalities of the litigation" make a uniform statute more desirable must be taken as a given, for if those policies and practical considerations do not exist in sufficient strength, the Court could not even consider applying a uniform period of limitations under *Wilson v. Garcia.* Selection of Section 4 of the Clayton Act as the period of limitations for RICO claims would ensure absolute predictability of result and true uniformity throughout the nation, as well as precluding forum shopping for the forum state with the longest period of limitation applicable to the analogous state claim.

Accordingly, we submit, if the federal policies and practicalities implicated by RICO litigation demand the application of a uniform period of limitations, the court should apply the four year limitations period provided by the Clayton Act.

D. It is Inappropriate to Analogize the RICO Cause of Action to Claims for Injury to "Tangible or Intangible Property" or to Actions to Recover a Civil Penalty or Forfeiture.

Assuming that the uniform characterization of RICO claims is mandated by *Wilson v. Garcia* and that *DelCostello* is not found to warrant application of the Clayton Act's four year period of limitations, one must proceed to the third step of the *Wilson* analysis and actually characterize the RICO claim.

1. The Property Statute

Petitioners and amici, Congress and PNB, suggest that Pennsylvania's two year limitations statute, 42 *Pa. C.S.A.* §5524 (Purdon 1981), should have been selected by the Third Circuit as the period of limitation to uniformly apply to RICO claims arising in Pennsylvania. The argument made in support of this suggestion is twofold. First, it is asserted that the choice is appropriate because Section 5524 covers conduct which may be analogized to the greatest number of "predicate acts" which, when they occur in statutory proximity, make up the pattern of racketeering activity proscribed by RICO. Second, it is urged that since Section 5524(3) applies to "an action for taking, detaining or injuring personal property" it is most analogous to the RICO private cause of action which allows recovery for "injury to business or property." Each argument is seriously flawed.

With regard to the assertion that the courts should borrow the limitations period given by Section 5524, in general, because it covers conduct which can be analogized to the greatest number of RICO predicate acts, this is plainly not what *Wilson* contemplates. Under that decision, the court is required to actually categorize the RICO claim as one specific type of claim for application of the most analogous state statute. *Wilson* expressly eschewed any approach to the limitations question involving a determination of which state statute governed the greatest number of acts potentially encompassed by the federal statute.

Moreover, the proposal is utterly unworkable and would pose even greater difficulties than an approach to the limitations question based on the facts and circumstances of an individual case. To apply the concept, one would have to determine which state claim was most analogous to each and every one of the 27 predicate acts specified by the RICO statute and then make a mathematical computation of which state statute of limitations applied to the greatest number of these acts. This would necessarily involve an individual characterization of each of the actions subject to the federal statute and a search for an analogous statute of limitations in state law which would produce a deluge of unnecessary and conflicting adjudications concerning the proper

characterization of each of the 27 predicate RICO acts in direct contravention of the directives of *Wilson*.

Further, because of the differing limitations schemes of the various states, the approach would produce the absurd result that the limitations period for RICO claims would vary from state to state based entirely on the fortuitous arithmetic circumstance of which state period of limitations happened to cover the greatest number of RICO predicate acts. It cannot be assumed that Congress intended such a mechanistic approach and such an absurd result. Thus, it must be rejected out of hand.

The argument in support of uniformly borrowing the two year limitations provisions of Section 5524 (3) is also inconsistent with the teachings of *Wilson* and unworkable. RICO affords a remedy not only for the taking of tangible personal property, but plainly extends its damage remedy to all commercial losses which occur as a result of the varied actions which may go to make up a pattern of racketeering activity. *E.g., Sedima v. Imrex Co., Inc., supra,* 105 S.Ct. at 3285-86. The states of our Union do not simply label all such commercial rights as "property" and apply a uniform period of limitation to tortious conduct which infringes such rights. Rather, the states define different periods of limitation by expressly distinguishing between both the type of interest infringed as well as the type of conduct causing that infringement. For example, in Pennsylvania during the period at issue here a "fraudulent" taking of tangible or intangible property — activities most analogous to that involved in most of the RICO actions brought — was subject to a six year limitations period. *See A. J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330 (3d Cir. 1986). An action involving the taking of property through securities fraud — the second most popular predicate for RICO actions — was subject to a three year limitations period. 70 P.S. §1-504(a) (Purdon, 1981). Actions for harm caused by statutory violations were subject to a six year limitations period. *See* 42 *Pa. C.S.A.* §5527 (Purdon, 1981); *Webster v. Great American Insurance Co.*, 544 F.2d 609 (E.D. Pa. 1982). Actions for abridgement of intangible property interests through tortious interference with contractual relations

were subject to a two year limitations period. *See Home for Crippled Children v. Erie Insurance Exchange*, 30 D & C 3d 357 (1982), *aff'd mem.*, 329 Pa. Super. 601, 478 A.2d 84 (1984). Actions resulting in business loss as a result of disparagement, business lible and the like were subject to a one year limitations period. *See* 42 *Pa. C.S.A.* §5523(1). Thus, to say that RICO claims should be analogized to claims for injury to "tangible and intangible property interests" under state limitations law is to say nothing. In order to choose among the varying periods of limitation prescribed by state law, a further determination would still be required as to what kind of property and what kind of taking could most appropriately be analogized to the RICO claims. Accordingly, characterizing the RICO claim as an action for injury to tangible or intangible property would not serve to achieve the uniformity and predictability of result contemplated by *Wilson*. To the contrary, it would continue to invite litigation, conflicting decisions and uncertainty as to the appropriate characterization of RICO claims for limitations purposes. Thus, it must be rejected.

2. The Penalty/Forfeiture Statute

It is also suggested that Pennsylvania's one year limitations provision, 42 *Pa. C.S.A.* §5523(2) (Purdon, 1981), for actions "upon a statute for a civil penalty or forfeiture" pertains to litigation most analogous to that contemplated by RICO and for this reason ought to be adopted. Given Pennsylvania law on the issue, it is disingenuous to suggest such an analogy.

The civil penalty/forfeiture limitation provision has consistently been interpreted by the Pennsylvania courts in a narrow fashion to apply only to actions by private individuals which seek to enforce a penalty given by statute and not to actions which, in any sense, seek compensation for damages caused to an individual. *See Shapiro v. Paramount Film Distributing Corp.*, 274 F.2d 743, 745-46 (3d Cir. 1960); *Allegheny City v. McCluckin & Co.*, 14 Pa. 81 (1850); *Commonwealth v. Musser Forests, Inc.*, 394 Pa. 205, 146 A.2d 714 (1958). *Seller v. Spiegel, Inc.*, 551

F.Supp. 235, 237 (E.D. Pa. 1982). Thus, it forms an inappropriate analogue for actions such as those brought pursuant to the Clayton Act and RICO where proof of individual damages is an absolute prerequisite to recovery and, therefore, compensation of individual injury is a significant aim and result of the statutory scheme.[3] *See Sedima v. Imrex, supra*, 105 S.Ct. at 3285-86.

E. It is Appropriate to Analogize the RICO Cause of Action to Claims for Statutory Violations or for Fraud.

It will be recalled that the *Wilson* decision justified the characterization of Section 1983 civil rights claims as personal injury tort actions on two distinct bases. The first was a principle of statutory construction. Here, it was concluded that Congress "would have intended" to apply the limitations scheme for personal injuries because, at the time Section 1983 was enacted, it was directed primarily to redressing injuries to the person and that statutory claims for relief — the other available analogue under state law — were uncommon. The second basis for the *Wilson* characterization was a principle of federalism. Because of the prevalence of personal injury litigation in all of the states, it was found "most unlikely that the period of limitations applicable to such [civil rights claims] was or ever would be fixed in a way that would discriminate against federal claims or be inconsistent with federal law in any regard." *Wilson, supra*, 105 S.Ct. at 1949.

These same considerations of statutory construction and federalism support analogizing the RICO claim either to a statutory tort claim to which the state's residuary or catchall limitations provisions would apply or to an action for fraud.

3. Indeed, it was for this reason that the United States Court of Appeals for the Third Circuit expressly declined to apply Pennsylvania's civil penalty/forfeiture limitations period by analogy to an action arising in Pennsylvania under the Clayton Act, opting instead for Pennsylvania's residuary six year limitation provisions. *See Shapiro v. Paramount Film Distributing Corp., supra. See also; Bertha Building Corp. v. National Theatre Corp.*, 269 F.2d 785 (2d Cir. 1985) (declining to borrow civil penalty provisions to bar Clayton Act suit arising in New York and adopting six year statute). *See also: Wilson v. Garcia, supra*, n. 19 (citing these cases as a "correct" approach to the issue).

1. The Catchall Provision

What RICO expressly prohibits is the conduct of an enterprise through a pattern of racketeering activity which is expressly defined as a pattern of violations of specified state and federal statutes. 18 U.S.C. §1961(1)(5). This express language virtually compels the conclusion that Congress viewed the private damage section of RICO as affording a remedy for violation of statutory prescriptions. And, unlike the scarcity of statutory causes of action at the time Section 1983 was enacted, at the time Congress enacted the civil remedy provisions of RICO, the existence of statutory tort claims was quite common throughout the United States. Accordingly, under *Wilson's* statutory construction principles, it may fairly be presumed that Congress viewed the RICO action primarily as a statutory tort action to which the analogous "residuary" or "catchall" provisions of the state limitations law would apply. Moreover, as petitioners and Amici have observed these residuary limitations provisions are neutrally established with relatively long periods of limitation making it unlikely that they would be used to eviscerate the remedial thrust of the RICO legislation. Accordingly, the statutory tort analogy is the most appealing to use in RICO from a theoretical standpoint.

The specific objection made to borrowing Pennsylvania's residuary limitations provision, 42 *Pa. C.S.A.* §5527 (Purdon, 1981), is that it does not clearly apply to claims predicated on the violation of a statute. However, that is not an accurate depiction of Pennsylvania law. The courts charged with applying that law have consistently interpreted Section 5527 as a statutory catchall provision encompassing actions based on a statute that are not governed by a more specific period of limitation. *See, e.g., Webster v. Great American Insurance Co.*, 544 F.2d 609 (E.D. Pa. 1982).

The problem with characterizing the RICO claim as a statutory tort action is that a few states do not have limitations provisions which can fairly be characterized as statutory catchall

provisions.[4] This would preclude the kind of uniformity of characterization in all 50 states which was sought to be achieved for civil rights claims by this Court's *Wilson* decision and would leave the RICO limitations question in doubt in those states.

2. The Fraud Analogy

Such uncertainty, however, would not attach to a determination to analogize the RICO cause of action to a claim for fraud for all of the states have clearly defined periods of limitation which are applicable to that ancient trespass. We believe that this is the most appropriate characterization under the *Wilson* criteria.

First, although Congress defined the acts which might go to form a pattern of racketeering activity broadly to include a wide variety of criminal behavior ranging from murder and kidnapping to mail and wire fraud, it is likely that by confining private recovery to business and property injury that it anticipated that the remedy would be used, as in fact it has, primarily to recover for losses caused by fraudulent behavior. Under the reasoning of *Wilson*, then, the legislature would presumably have intended that the limitations periods applicable to fraud claims apply to RICO causes of action.

Second, the federalism criteria of *Wilson* also makes a fraud characterization most appropriate for the RICO cause of action. Fraud is an ancient form of action as to which all of the states have well-defined and long-standing periods of limitation. While

4. As amici PNB and Congress point out, roughly one-half of the states have "catchall" limitations provisions which expressly apply to statutory violations not otherwise limited. The rest have residuary provisions which apply more broadly to all claims not otherwise provided for. Presumably, many of these broad residuary limitations statutes will also apply to statutorily created claims for relief which are not otherwise limited. Notably, eight of the thirteen states cited by Congress and PNB as having broad residuary limitations provisions of ten years or more also have separate statutory catchall provisions with significantly shorter periods of limitations. Thus, the problem of creating overly long periods of limitation for RICO claims by borrowing the statutory omnibus limitations provisions of the states which is prophesied by PNB and Congress is largely fanciful.

actions predicated on fraud are not as common in number as personal injury suits, they are nevertheless a frequent subject of litigation in state courts. These circumstances no doubt make it highly unlikely that state legislatures would establish fraud limitations periods in a way which will have an untoward affect on the RICO civil damage remedy.

Finally, there is a third consideration which makes fraud the appropriate analogue for RICO claims and that is the reality of RICO litigation. As *Wilson* recognized, the heart of the federal limitations borrowing process is the thesis that "[b]y adopting the statute governing an analogous cause of action under state law, federal law incorporates the state's judgment on the proper balance between the policies of repose and the substantative policies of enforcement embodied in the state cause of action." *Wilson, supra*, 105 S.Ct. at 1945. As petitioners, amici and this Court have recognized, most of the litigation brought under RICO involves misrepresentations of one kind or another. *See Sedima v. Imrex, Supra*, 105 S.Ct. at n. 16; Brief Amici Curiae for Congress and PNB at pp. 20-21. Given that overriding reality, it would seem that the state's judgment on the repose to which fraudulent action is entitled represents the best available judgment on the vast majority of RICO litigation which the courts will confront. Indeed, with the amount of RICO litigation which is predicated on fraud theories, it seems almost absurd to suggest that some period of limitations pertaining to non-fraudulent behavior ought to govern RICO litigation.[5]

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5. Amici, Congress and PNB, note that many claims under RICO involve instances of oral misrepresentation and that the states, perceiving a problem with proving such claims at a great distance in time have provided shorter periods of limitation for such fraud claims. If that is so, it justifies applying the period of limitation for fraud and not the illogical leap which they suggest to apply the altogether different repose judgments embodied in the statutes pertaining to civil penalty and forfeiture actions.

IV. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals ought to be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Michael D. Fishbein, a member of the bar of the Supreme Court of the United States, hereby certifies that on February 17, 1987 he caused three copies of the Brief Amici Curiae for A.J. Cunningham Packing Corp., Chicago Dressed Beef Co. Inc., Continental Food Products, Inc., Florence Beef Company and Pierce Trading Company in Support of Respondent to be served upon each of the following attorneys for Petitioners and Respondent herein by first class mail, postage prepaid, addressed as indicated: Robert L. Frantz, Counsel of Record for Petitioners in No. 86-497, 57th Floor, 600 Grant Street, Pittsburgh, PA 15219, John H. Bingler, Jr., Counsel of Record for Petitioner in No. 86-531, 1 Riverfront Center, Pittsburgh, PA 15222, and H. Woodruff Turner, Counsel of Record for Respondent in Nos. 86-497 and 86-531, 1500 Oliver Building, Pittsburgh, PA 15222. All parties required to be served have been served.

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